

The
Indian Limitation Act

No - 15

1877

A handwritten signature in black ink, appearing to be 'Sms.' with a large, stylized initial 'S'.

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THE INDIAN LIMITATION ACT

ACT No. XV OF 1877.

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RECEIVED THE G.G.'s ASSENT ON THE 19TH JULY, 1877.

An Act for the Limitation of Suits, and for other purposes.⁽¹⁾

Whereas it is expedient to amend the law relating to the limitation of suits, appeals and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows :—

(Old Acts)

[Whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications⁽¹⁾ to Courts; and whereas it is also expedient to provide rules for acquiring ownership by possession :

Preamble, Act IX of 1871.

Preamble, Act XIV of 1859.

Whereas it is expedient to amend and consolidate the laws relating to the limitation of suits⁽¹⁾ :

(Notes)

1. Act XIV of 1859 was entitled "An Act to provide for limitation of suits," though, in the body of the Act, there were provisions regarding applications for execution of decrees &c., thereby leading to the inference that the Act drew no distinction between 'suits' and 'applications for execution of decrees' (9 W.R. 402, F.B.); whereas the title and the preamble of the present Act, as well as those of Act IX of 1871, would show that a distinction is drawn between 'suits' and 'applications' and 'appeals.'

PART I.

PRELIMINARY.

Short title. 1. This Act may be called the Indian Limitation Act, 1877.

Extent. It extends to the whole of British India; but nothing contained in sections 2 and 3 or in Parts II and III applies—

(a) to suits under the Indian Divorce Act (IV of 1869),⁽¹⁾ or

(b) to suits under Madras Regulation VI of 1831,

Commencement. and it shall come into force on the first day of October, 1877.

(Old Acts)

S. 1, Act IX of 1871. [This Act may be called "The Indian Limitation Act, 1871."

It extends to the whole of British India; but nothing contained in sections two and three or in Parts II & III applies—

(a) to suits instituted before the first day of April, 1873;

(b) to suits under the Indian Divorce Act;

(c) to suits under Madras Regulation VI of 1831.

Act XIV of 1859. *Nothing corresponding to the present section.]*

1. Act inapplicable to Divorce Suits:—

The provisions of the Limitation Act do not apply to suits for divorce *a vinculo*.
10 B.L.R. 301=18 W.R. 480=Sup. Vol. I.A. 106 (P.C.).

General.

Object of Limitation Acts:—

1. The object of Limitation Acts is to quiet long possession and extinguish stale demands. 20 W.R. 375 (377)=13 B.L.R. 177 (P.C.);
2. not to create or define causes of action, but simply to prescribe the periods within which existing rights may be enforced. 3 B. 207; 28 C. 37=5 C.W.N. 195.

Construction of Limitation Acts:—

1. Statutes of limitation being, in their nature, strict and inflexible enactments, they ought to receive such a construction as the language in its plain meaning imports. 20 W.R. 375 (377)=13 B.L.R. 177 (P.C.).
2. A law limiting the period within which suits may be brought ought to be construed strictly; and where the law has not *expressly* limited the time for suing, the Court ought not to prescribe a limit merely because there is reason to infer that the Legislature intended to prescribe such limit though it accidentally omitted to do so. 2 W.R. 268 (264).

General.—(Continued).

3. Where the language of an Act is ambiguous or indistinct, it ought to receive a liberal interpretation and the Act treated as a "Statute of repose" and not as of a penal character or as imposing burdens. Per *Mahmood J.* in 8 A. 475; 3 M.H.C. 5; 8 C. 214; 3 W.R. 101; 1 I.A. 167 (P.C.).
4. The interpretation to be placed on Acts of Limitation must be strictly in favour of their operation. Per *Mahmood J.* in 8 A. 475 (484).
5. An Act of Limitation being restrictive of the ordinary right to take legal proceedings, it must, where its language is ambiguous, be construed strictly, i.e., in favour of the right to proceed. 9 B. H.C. 99 (111); 1 B. 19 (23); 7 B. 512 (515).
6. Where the language of an Act of Limitation specifies the particular cases for which a period of limitation is provided, Courts ought not to interpret that language so as to include cases not falling within the strict meaning of the words used. 3 C.L.R. 440.
7. Statutes of limitation, being in limitation of common right, are not to be extended, by construction, to cases not clearly included within their terms. 15 B. 299, and the cases cited therein at p. 305.
8. The construction of Acts not *in pari materia* with the Limitation Act (e.g., the Court-fees Act) cannot be called in aid of the construction of the Limitation Act. 4 B. 515 (526) (F.B.).
9. The Limitation Act will not bar the enforcement of a penal provision, (e.g.) the recovery of an advance under Act XIII of 1859. 11 M. 332; 16 M. 347.

Applicability of sections of Act, how determined :

The applicability of particular sections of the Limitation Act ought to be determined by the character of the thing sued for, and not by the status, race, character or religion of the parties to the suit. 1 I. A. 84= 13 B.L.R. 254 = 21 W.R. 178 (P.C.). Compare 10 C. 73; 2 M. 283 (285); 5 B. 404 (411)= 8 I. A. 77 (P.C.) and 6 B. 546 (553) (F.B.).

Whether Law of Limitation is law of Procedure :-

- (a) As to -- see S.C. 51= S.I.A. 123= 11 C.L.R. 113 (P.C.); 5 B. 673 (F.B.) and 7 B. 459 noted under S. 6 of the General Clauses Act (X of 1897) at p. 272 of 'The Lawyer's Companion.'
- (b) An Act of limitation is a law of procedure; as such, it governs all proceedings to which it is applicable from the moment of its enactment except so far as its operation is expressly excluded or postponed. 11 B.H.C. 117.
- (c) But, when the retrospective operation would destroy vested rights or inflict hardship, which could not have been in the contemplation of the Legislature, then a law of limitation ought not to be construed retrospectively. 6 B. 26.

Custom :—

No ——— can be allowed to override the provisions of an Act of Limitation. 3 B. 174.

General.—(continued).**Mistake:—**

A plaintiff cannot be allowed to take advantage of his own—to relieve himself from the law of limitation. 3 C. 817.

Criminal cases:—

1. Rules of limitation are foreign to the administration of Criminal justice, and it is only by express statutory provision that any rule of limitation can be made applicable to criminal cases. 10 A. 350.
2. Except where expressly provided, the general law of limitation and its schedules are chiefly intended for civil, and not for criminal, matters. 20 B. 543 (547).

Plea of limitation:—

A Court should give specific reasons and declare judicially why it holds that a plea of limitation is worthless or of no force. 16 W.R. 280.

2. [Repeal of Acts.] *Repealed by the Repealing and Amending Act, 1891 (XII of 1891).*

All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired⁽¹⁾, or to revive⁽²⁾ any right to sue⁽³⁾ barred, under that Act or under any enactment thereby repealed; and nothing herein contained shall be deemed to affect the Indian Contract Act, section 25⁽⁴⁾.

References to the Indian Limitation Act, 1871.

Saving of titles already acquired.

Saving of Contract Act, 1872, section 25.

(Old Acts)

(N.B.)—There was no section in either of the two previous Acts corresponding to the above section.

(Notes)**1. 'Title acquired.'****Right to sue:—**

A ——— is not a title acquired. A right to sue on unsigned accounts stated between the parties, when Act IX of 1871 was in force, was not a 'title acquired' under that Act. A plaintiff, therefore, suing within three years from the statement of such accounts, could not claim the benefit of art. 64 of the present Act. The words 'title acquired' denote a 'title to property,' as distinguished from a 'right to sue.' 2 A. 872; 3 A. 148 (F.B.).

2.—'Revive.'**Suits barred under Act XIV of 1859 or Act IX of 1871:—**

No suit, which became barred while Act IX of 1871 or XIV of 1859 was in force, can be maintained under this Act. 5 A.W.N. 305; 3 A.W.N. 19; 4 A.W.N. 25; 3 A.W.N. 202; 12 M. 26=15 I.A. 167 (P.C.); 20 C. 487=20 I.A. 30 (P.C.).

2.—'Revive.'—(continued).**Insufficiency of acknowledgment to sustain suit: —**

Acknowledgments which are insufficient to keep a cause of action alive on the ground that they were, when the earlier Limitation Act 14 of 1859 was in force, signed by an agent, are equally insufficient to sustain a suit on the same cause of action under the present Act XV of 1877, since S. 2 expressly bars the revival of a right to sue barred under the earlier Acts. 8 B. 99; see also 62 P. R. 1881; though such an acknowledgment would have been sufficient to sustain an action under Act IX of 1871. See 6 C. 340.

Effect of repeal of enactments.**A.—Cases barred under repealed enactments:**

1. Case in which the Privy Council held that a suit for partition by a Hindu having been barred before 1871, neither the Act of 1871 nor that of 1877 could revive the right of suit, although these Acts allowed a more extended period of limitation for a suit for partition. 12 M. 26—15 L. A. 167 (P.C.). See also 109 P.R. 1884, and 142 P.R. 1890; and compare 20 C. 487—20 L.A. 30 (P.C.)
2. The repeal of a statute or other legislative enactment cannot, without express words or clear implication to that effect in the repealing Act, take away a right acquired under the repealed statute when it was in force. So, if the plaintiff's right to sue for property be barred by an enactment when it was in force, defendant (the holder of the property beyond the statutory period) acquires a prescriptive title thereto; and the subsequent repeal of that statute will not take away the right of the defendant thus acquired, (*i.e.*) not only will the plaintiff's remedy be barred, but also his right will be extinguished. 1 B. 286 (291); *Cf.* 15 B. 299; 7 M.H.C. 298 (300); 1 C. 328; 11 M.L.A. 345—7 W.R. 21 (P.C.); 13 B.L.R. 445;
3. nor will the plaintiff be allowed to derive any advantage from the extended period of limitation provided by the repealing enactment. 4 C. 283 (297)—3 C.L.R. 396; 12 M. 26—15 L.A. 167 (P.C.).
4. The above principles, which are applicable to *property*, were applied in suits for *maintenance*. 3 C. 331.
5. in suits for *debts*. 1 C. 328; 7 M.H.C. 298; 2 M.H.C. 472; 7 M.H.C. 392; 7 B.H.C.A.C. 181; 1 B. 305 (Note); 4 B. 230.
6. In 4 C. 283, Garth, C.J., expressed a doubt whether the principles would apply to cases of *debts*.
 - In the case of debts, the remedy is barred but the debt is not extinguished.
7. In 5 C. 897—6 C.L.R. 489, and 6 C. 340—7 C.L.R. 121, it was held that, as far as regards debts and decree-debts, the Indian Laws of limitation merely bar the remedy but do not extinguish the right, and that the law of limitation governing a suit for a debt is that law which is in force on the date of its institution.

2. — 'Revive.'—(continued).

8. On the principle in No. 7, *supra* :

(a) it was held in 1 M. 228, and 1 M. 261, and 6 C. 340, that payment, before Act IX of 1871 came into force, of interest due on a debt incurred when Act XIV of 1859 was in force, was sufficient to keep it alive and give a new start for limitation, although the right to recover the debt had been barred when the new Act (IX of 1871) came into force;

(b) In 1 M. 267 it has been held that the Administrator-General, Madras, is authorized to pay a barred debt on the ground that the debt or demand itself is not extinguished by the Limitation Act, though the remedy by suit is barred.

On the same point see also 6 M. 351 and 10 B.H.C. 206.

(c) In 11 B. 320, 11 B. 325, and 21 C. 190 it has been held that a Hindoo widow is competent to alienate her husband's estate for paying his barred debt: see on a similar point 2 B. 67 and 2 B. 75.

But in the Punjab it has been held that the widow is not competent to alienate her husband's estate for the purpose of paying a barred debt of his or to pay a barred debt out of such estate. 108 P.R. 1885.

(d) In 12 C. 330 and 5 B. 647, it has been held that, though the remedy against the principal debtor is barred, that against the surety, if within the period of limitation, may be enforced.

—Cases not barred under repealed enactments:—

Cases, in which the full period of limitation provided therefor not having run out, the claim is alive when a repealing Act comes into force, stand on a different footing. In such cases, it is the repealing Act that is applicable. If the provisions of the repealing Act are more favorable, the suitor will be entitled to take advantage of it. See on this point 1 B. 305 (Note); 1 M. 301, 1 M. 264.

Where the provisions of Act XV of 1877 were unfavorable to the suitor,—(i.e.) in cases where the periods proscribed by the present Act were shorter—the law allowed a certain time from the date of the coming into operation of this Act for the enforcement of such claims: 5 years in cases falling under art. 146 of the 2nd Schedule; and 2 years in other cases; and such claims as were not so enforced were barred. This provision, which was to be found in cl. 3 of this section as originally passed, having been spent and no longer required, was repealed by Act XII of 1891.

period in the new Act (XV of 1877) when shorter:—

For ascertaining whether the period was shorter, reference had to be made, not only to the entry in Column 2 of the Schedule, but also to the starting point mentioned in Col. 3. Where the effect of the entry in Col. 3 was to shorten the period, the claim could be enforced within two years from the passing of the new Act (XV of 1877): see on this point 9 M. 175. Thus, even if the entry in Column 2 of Act XV of 1877 in respect of a particular suit was the same as that in Col. 2 of Act 9 of 1871, if the starting point of limitation was later under Act IX of 1871, the

2.—‘Revive.’—(continued).

period under Act XV was considered *shorter*. * See on this point 3 A. 415; 2 C.L.R. 426; 2 M. 113; 2 M. 397 and 4 B. 87; 7 C. 461; 9 B. 475; 4 C.L.R. 102; 8 C.L.R. 243. •

(N.B.)—Details of these and similar cases have not been given here, because the portion of the section, which they bore on, has since been repealed by Act XII of 1891. •

3.—‘Any right to sue.’

The words ---include right to apply for execution of decrees. 5 C. 894=6 C.L.R. 137; 5 C. 837 -6 C.L.R. 189; 10 C. 719; 9 W.R. 402 (F.B.) •

Execution applications by what law governed.

(a) In 8 C. 51 (P.C.) - 8 L.A. 123 - 11 C.L.R. 113 (P.C.) and 5 B. 673, it was decided that an application for execution of a decree, being a proceeding in the *suit*, was governed by the law of limitation in force at the date of the institution of the suit. •

(N.B.)—These were decisions under Act IX of 1871, which contained a provision to the effect that nothing contained in Ss. 2 and 3 or in Parts II and III of that Act extended to an application for execution of a decree in a suit instituted before the 1st April, 1873. (Vide S. 1 of Act IX of 1871, printed *supra*).

(b) In 7 C. 459, it was held that, inasmuch as Act XV of 1877 does not exempt, from its operation, suits filed before its introduction, the Limitation Act applicable to execution proceedings taken after the passing of Act XV of 1877 (in suits instituted when Act IX of 1871 was in force) is Act XV of 1877 and not Act IX of 1871. •

(c) In 8 B. 310 (316), it was held that a new order of Court, not merely auxiliary or provisional, but one directing a further *substantive step* in the execution of a decree, is a new proceeding governable by the limitation Act in force when such new order is passed. •

(d) In 9 C. 446, it was held that, notwithstanding the absence, in Act XV of 1877, of a provision similar to that in S. 1 of Act IX of 1871, all applications for execution of a decree are applications in the *suit* which resulted in the decree and that the repeal of Act IX of 1871 by Act XV of 1877 did not affect any proceedings commenced before the latter Act came into force. •

(e) In 9 C. 644 (646, 617), the point whether the ruling in 8 C. 51, noted *supra*, would apply to an application for execution filed after the repeal of Act IX of 1871, was left open. •

(f) In 10 C. 748, the decree was dated 1862; decree-holder was a minor when the decree was passed and attained majority in 1879. Some execution proceedings taken in 1866 on his behalf were struck off the file in the same year. Present application in 1882 within three years of his attaining majority. Held, Act 14 of 1859 was applicable to proceedings taken before Act XV of 1877 and the application was consequently not barred. • •

3.—‘Any Right to sue.’—(continued).

(g) In 11 C. 55, it was held that Act XV of 1877 operates from the date on which it came into force as regards all applications made under it. (9 C. 446, noted above was *dissented from* in this case). See also 10 B. 108; 16 C. 267 (279 and 280) (F.B.).

(h) In 18 M. 482, decree, dated 1870, for maintenance payable at a specified date every year. First application for execution in 1873; the next, in 1879, was dismissed on the ground that it was barred by limitation. Present application, in 1891, for arrears due for the three next previous years. *Held*, (1) the question whether the application was barred by limitation was not *res judicata*; (2) the application was not barred.

“The decision in 8 I.A. 123 proceeded solely on the language of S. 1 of Act IX of 1871, which was repealed by Act XV of 1877. This latter Act contains no language excluding from its operation proceedings in suits instituted prior to its coming into force.”

(N.B.)—It is now settled by legislation (See Act VI of 1892, S. 4) that applications for execution of decrees are proceedings in *suits*.

Application of Act to applications barred under Act IX of 1871:—

This Act cannot be applied to an application for execution which, at its becoming law, was barred by the Act of 1871, unless it can be shown that such was the *express* intention of the Legislature. 5 C. 894=6 C.L.R. 437.

4.—‘Nothing.....Contract Act, S. 25.’

An acknowledgment under S. 19 of this Act does not destroy the original cause of action, but only furnishes a fresh starting point for limitation. But, if a debt is *barred* and a new contract is made promising to pay the very debt *barred* by limitation, there is a legal consideration for the contract and it is enforceable as a *new* contract in the place of the one *barred*. 1 B. 590; 2 B. 230; 4 C. 500.

3. In this Act, unless there be something repugnant in the subject or context,—

‘plaintiff’⁽¹⁾ includes also any person from or through whom a plaintiff derives his right to sue; ‘applicant’ includes also any person from or through whom an applicant derives his right to apply; and ‘defendant’⁽²⁾ includes also any person from or through whom a defendant derives his liability to be sued:

‘easement’⁽³⁾ includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing on, or attached to, or subsisting upon, the land of another:

‘ bill of exchange ’ includes also a hundi and a cheque :

‘ bond ’ includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be :

‘ promissory note ’ means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight :

‘ trustee ’⁽¹⁾ does not include a benámidár, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title :

‘ suit ’⁽²⁾ does not include an appeal or an application :

‘ registered ’ means duly registered in British India under the law for the registration of documents in force at the time and place of executing the document, or signing the decree or order referred to in the context :

‘ foreign country ’ means any country other than British India :

and nothing shall be deemed to be done in ‘ good faith ’ which is not done with due care and attention.

(Old Acts)

[S. 3. Act IX of 1871 ‘ plaintiff ’ includes also any person through whom a plaintiff claims : ‘ registered ’ means duly registered under the law for the registration of documents in force at the time and place of executing the documents referred to in the context : ‘ bill of exchange ’ includes also a hundi.

(N.B.)—1.—The definitions of ‘ minor ’ and ‘ nuisance,’ which were to be found in Act IX of 1871, have not been enacted in the present Act (XV of 1877).

2.—The definitions of ‘ applicant,’ ‘ defendant,’ ‘ easement,’ ‘ bond,’ ‘ promissory note,’ and ‘ suit,’ have been newly enacted in the present Act (XV of 1877).

Act XIV of 1879—There was no interpretation-clause at all in this Act.]

(N. B.)—The effect of the omission of the definition of ‘ Minor ’ in this Act is to apply the provisions of the Indian Majority Act (IX of 1875) to suits arising under this Act.

(Notes)

1.—‘ Plaintiff.’

A daughter’s son (Hindu) suing to set aside an adoption by the widow of the last male owner, *held* to fall within this definition. 24 M. 405.

2.—'Defendant.'

1. An auction-purchaser purchasing the right, title and interest of the judgment-debtor derives his liability to be sued from the latter. 18 B. 37; 16 B. 197.
2. For purposes of limitation an adopted son may tack on his own adverse possession to that of his adoptive mother, she being a person from whom he derives his liability to be sued. 13 B. 160.

3.—'Easements.'

- (a) The term—includes profits *a prendre*. 23 C. 55 (59).
- (b) A prescriptive right of fishery is an easement within the meaning of this section. 5 C. 945 6 C.L.R. 269.

4.—'Trustee.'

- (a) A *beneficial* is not a 'trustee' within the meaning of S. 2 of Act XIV of 1859. 2 B.L.R.A.C. 284;
- (b) nor is a mortgagee remaining in possession after the satisfaction of a mortgage. 9 W.R. 187.

5.—'Suit.'

1. This distinction between a suit and an application has no bearing on questions other than those of limitation. 5 B. 680.
2. An application for execution of a decree is not a —. 1 A⁹⁷ (F.B.); 2 C. 346 (F.B.); 79 P.R. 1877 (F.B.).
3. The word "suit" does not include an appeal or application. 23 P.R. 1883, 143 P.R. 1883.

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

4. Subject to the provisions contained in sections 5 to 25 (inclusive),⁽¹⁾ every suit instituted,⁽²⁾ appeal presented,⁽³⁾ and application made,⁽⁴⁾ after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.⁽⁵⁾

Dismissal of suits, &c., instituted, &c., after period of limitation.

Explanation.—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer⁽²⁾; in the case of a pauper, when his application for leave to sue as a pauper is filed⁽⁹⁾; and in the case of a claim against a Company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

Illustrations.

- (a) A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence and judgment is given for the plaintiff. The defendant appeals. The Appellate Court must dismiss the suit.
- (b) An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

(Old Acts)

[S. 1. Act IX of 1871.—Same as above.

S. 1. Act XIV of 1859.—No suit shall be maintained in any Court of judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or regulation to the contrary notwithstanding.]

(Notes)**Scope of Section.**

The limitation for applications made after 1st October, 1877, is that prescribed in the 2nd Schedule. 23 P.R. 1883, 143 P.R. 1883.

Distinction between 'appeals' and 'applications':—

——— printed out; Section 5 of the Act does not apply to an application, order art. 177, for leave to appeal to the Privy Council. 2 M. 230.

General.**(a) Burden of proof:—**

- (1) Plaintiff ought to show that his suit is brought within time or that there are circumstances which take his case out of the ordinary period of limitation, 24 W.L. 181, or extend the period. 4 C.P.L.R. 57.
- (2) If the defendant asserts that a shorter period of limitation applies to the plaintiff's suit, the burden of proving circumstances bringing the suit within the shorter period lies on the defendant. 7 B. 478.
- (3) The defendant may take advantage of the evidence led in by the plaintiff going to show that the suit is barred. 7 A. 677.

(b) Inapplicability of Section:—

- (1) This section does not apply to giving of security under S. 602, C.P. Code. The Court may extend the time. 10 C. 557 (P.C.).
- (2) Nor to applications to a Court to do what it has no discretion to refuse; nor to applications for exercise of functions of a ministerial character. 4 M. 172; 6 B. 586.
- (3) Nor to amendment of a decree under S. 206, C.P.C., so as to correct a clerical or arithmetical error, and the mere fact that an application has been made by a party towards the Court's exercising the power vested in it would not render the action of the Court subject to limitation. 8 A. 519 (534).

General.—(continued).**(c) Extension of limitation:—**

A rule of Court cannot cut down or extend the period of limitation provided by an Act of the Legislature. 2 M.H.C. 268.

(d) Agreement of parties affecting limitation:—

- (1) The period of limitation cannot be extended or altered by agreement of parties and no such agreement can affect the question of limitation. 18 W.R. 44 (F.E.); 20 W.R. 395.
- (2) In 5 C. 820—6 C.L.R. 136, it has been held that the parties cannot, by an agreement between them, extend the period allowed by the Registration Act for the registration of a document.
- (3) There may be an agreement that, in consideration of an inquiry into a disputed claim, no advantage should be taken of the law of limitation in respect of the time occupied in the enquiry, and an action might be brought for breach of such agreement. 5 M.I.A. 43 (P.C.)

1. 'Subject to the provisions.....5 to 25.'**'Subject to the provisions &c:—**

The meaning of this is that, of those provisions, only those that are applicable to the particular subject should be applied to it. 24 W.R. 405 (406); 1 A. 644 (646).

Memo of cross-objections:—

No period of limitation being provided for putting in memo of cross-objections by the second schedule to this Act, this section has no application thereto and the Court cannot, under S. 5, extend the time provided therefor. 7 C. 654—9 C.L.R. 265.

2. 'Suit instituted' when the plaint is presented to the proper officer.**(a) Production of Certificate under Act 23 of 1871:—**

A suit is instituted when the plaint is presented, not when a Certificate under the above Act is produced. 17 B. 169.

(b) Presentation of Plaint—Non-acceptance:—

The date of the—ought to be considered as the date of the institution of the suit, though on that date the plaint is not accepted. 19 W.R. 159.

(c) Presentation—Registration:—

A suit is said to be presented on the date on which the plaint is presented, not on that on which it is registered as a suit. 7 W.R. 241.

(d) Suit against a minor—Appointment of guardian:—

A— is instituted for purposes of this section on the date of the presentation of the plaint, and not on the date of the appointment of a guardian *ad litem* for the minor. 4 A. 37; 18 W.R. 1901. Compare 1 A.W.N. 129.

2.—‘Suit instituted,’ &c.—(continued).**(e) Presentation of unstamped plaint:—**

For purposes of limitation, the——— is no presentation at all, though the requisite Court-fee is paid after the expiry of the period of limitation. 1 P.L.R. (1900), p. 191: 180 P. R. 1890.

(f) Insufficiently stamped plaint:—

1. A suit is instituted when the plaint, notwithstanding that it is insufficiently stamped, is presented for admission. 2 L.B.R. (1899-1900), 33.

2. So, a plaint, which is returned for deficiency in court-fee being supplied and re-presented with the deficiency supplied, although when the deficiency is supplied limitation for the suit has run out, will be considered to have been put in when it was originally presented; 11 M.L.J. 119; 9 M.L.J. 37; 15 M. 29; 1 M.L.J. 508; 22 M. 494; 3 P.R. 1898; 74 P.R. 1903. But see 20 M. 319 = 7 M.L.J. 257.

3. The suit will be considered to have been instituted on the date of the original presentation of the plaint, if the deficiency is supplied *within* the time fixed by the Court for supplying the deficiency, though beyond the time allowed for the suit. 27 C. 814 = 4 C.W.N. 818 (*distinguishing* 19 C. 747 and 20 M. 319); 20 C. 41; 19 C. 780; 31 C. 75 27 B. 380 = 5 Bom. L.R. 198.

4. If, however, the deficiency is supplied *beyond* the time fixed by the Court, when limitation has run out, the suit will be considered barred. 27 C. 376 (*following* 8 C. 192; 12 A. 553; 1 C.W.N. 670; and *distinguishing* 19 C. 780 and 20 C. 41.)

Compare with the above cases 12 A. 120 (F.B.) = 10 A.W.N. 89 which holds that presentation of an insufficiently stamped memorandum of appeal is no presentation at all for purposes of this section; 15 A. 65 (F.B.) = 13 A.W.N. 29 (F.B.); 20 A. 11 (F.B.); 23 A. 423; 24 A. 218, which hold that in fixing a time for supplying deficient court-fee, the Court ought to fix a time *within* limitation; otherwise the suit will be barred.

5. The presentation of an——— to the Clerk of the Court cannot be said to be an institution of the suit, for purposes of limitation, when the same is not received by the Clerk. 1 C.P.L.R. 99.

(g) Application for review:—

An insufficiently stamped——— stands on the same footing as an insufficiently stamped plaint. 12 A. 57.

(h) Claim of set off:—

A——— raised in a written statement before it is barred by time will be considered as presented within time even if the stamp leviable thereon is levied after the claim is barred by limitation. 5 M.L.J. 233.

2.—'Suit instituted,' &c.—(continued).

(i) Non-issuing of summons:—

1. Case in which it was held that, though a plaint was put in Court in time, the plaintiff's failure to take out summons till after the suit was barred, operated to bar the suit by limitation. 3 C. 312.
2. In 5 C. 126, it was held that a summons ought not to be ordered to issue, after the suit is barred, unless the plaintiff has, in the meantime, done all in his power to prosecute his suit with due diligence.

(j) Presentation—Despatch by post:—

1. A despatch by post is not presentation to the proper officer of the Court, even if such a plaint is accepted and the party afterwards appears. If the necessary processes under the Court's order, it may be held that the institution was not bad. 8 M. 411.

(k) Presentation to a different Court:—

The presentation of a plaint to a District Court—the subordinate Judge's Court wherein the suit ought to have been presented being temporarily closed—held not to be a presentation to the proper Court 10 B.H. A.C. 495.

(l) Presentation at residence of Judge:—

The presentation of a plaint to a Munsiff at his residence held not a proper presentation. 7 N.W.P.H.C. 5.

(m) Presentation to Karkun during vacation:—

The presentation of a plaint to the *karkun* of a Court, who was left in charge of the Court during vacation, was held not a presentation to the proper officer, the Judge being the proper person to receive plaints. 6 B.H. C.A.C. 254. Compare 4 B.H.C.A.C. 39.

(n) Re-presentation of Plaint:—

- (a) The date of the original presentation of a plaint, and not that of its re-presentation after amendment, determines the date of institution of a suit for purposes of limitation. 6 W.R. 39; 7 W.R. 157; 1 M.H.C. 427; 2 A. 332; 5 W.R. 207; 23 W.R. 447.

Limitation counts from the date of the original presentation of the plaint and not from the date of its subsequent amendment, even though such amendment involves the addition of a new party. 9 B. 373 (402); 19 B. 320; Compare 11 M.I.A. 468=9 W.R. 9 (P.C.) and 5 B. 609.

- (b) A plaint returned for amendment, and re-presented after the period of limitation but within the time fixed by the Court, must be held to have been presented on the date of the original presentation. 6 M.L.J. 211.

The date of the original presentation of the plaint, and not that on which it was filed in another Court as an amended plaint or as one returned to be filed in such Court, determines the institution of the suit, for purposes of limitation. 16 W.R. 47.

2.—'Suit instituted' &c.—(continued).

- (c) Where a suit instituted within time is returned to the plaintiff after issue of summonses, the defendants not having been found, for being represented when the whereabouts of the defendants could be found, will be in time, though, when the plaint was re-presented, limitation had expired. 22 P.R. 1867.
- (d) Where a plaint, presented in time to the proper court, was returned by that Court to be presented to the Court deputed to try the suit and was re-presented to the Court deputed, at a time when the period prescribed had already expired, the suit should not be dismissed. 7 P.R. 1895.
- (e) A plaint returned for proper verification cannot be admitted if not re-presented duly verified within the period allowed by the Court and within the period of limitation provided for the suit. 4 W.R. 81.

Transfer of suit :—

A suit instituted in one Court having been transferred by the High Court to another Court, and the plaint having been returned by the first Court for presentation to the Court to which it was transferred, *held* that the date of the first presentation of the plaint to the first Court determined the institution of the suit. 3 W.R. 20.

3.—'Appeal presented.'

Unstamped Appeal :—

An——presented within the period of limitation is in time, though, when the stamps are furnished, it is barred by limitation. 15 M. 78 [following 2 A. 241 (P.C.)=6. 1. A. 126 (P.C.)]; 15 M. 29=1 M.L.J. 598.

But see 20 M. 319=7 M.L.J. 319 and 12 A. 129 (F.B.)=10 A.W.N. 39.

(2) Presentation of Appeal :—

Presentation of an appeal unaccompanied by a copy of the decree appealed against is not a proper presentation within the meaning of this section. 12 A. 129 (F.B.)=10 A.W.N. 39; 16 A. 77; A.W.N. 1892, 47; 53 P.R. 1887; 147 P.R. 1879; 7 P.R. 1879.

(3) Second appeal—copy of decree of first Court :—

Production, with a memorandum of second appeal, of a copy of the decree of the Court of first instance is unnecessary. 4 M. 419 (F.B.).

(4) Re-presentation of Appeal :—

An appeal presented within time, but returned for correction and re-presented, will be deemed as presented on the date of the original presentation, and not on the date of the re-presentation after correction. 1 A. 260.

"Presentation to proper officer of Court."

Criminal appeal—Prisoner in jail :—

The presentation, by a prisoner in jail, of an appeal memorandum to the jailor is tantamount to presentation to Court for purposes of limitation. 9 M. 268.

4.--'Application made.'**(a) Insufficiently stamped Review Application :--**

In the case of an———, it will be considered as made, for purposes of limitation, only on the day the deficiency in stamp is supplied. 12 A. 57.

(b) Supplemental application for execution :--

Where, the original application for execution being defective in certain particulars, a second application furnishing such particulars is put in, the two may be considered as one application put in on the date of the first. 14 C. 121.

(c) Day of taking out summons.—

Taking out a summons calling on the respondent to attend the Judge in Chambers on the hearing of an application for refund of money, is not tantamount to putting in an application for the purposes of this section. If the actual application is put in after the limitation prescribed therefor, it will be barred. 20 C. 809 (F.B.).

5.--'Shall be dismissed although limitation has not been set up as a defence.'**(a) Court taking point of limitation :—**

If, upon the facts, it is clear that a suit is barred by limitation, the Court may, of its own motion, take the point of limitation and dismiss the suit. 28 C. 86=5 C.W.N. 160.

(b) To what Court the obligation attaches :—

The Court of first instance is bound to reject the plaint if it is barred. The same obligation does not rest on each Court in succession, whenever the objection comes to view. 8 B. 535 (536).

(c) Nor after delivery of award :—

After a suit has been referred for decision to arbitrators with the consent of parties and of the Court and an award has been delivered, it is not competent to the Court to dismiss the suit on a point of limitation. 17 A.W.N. 162.

(d) Abandonment by defendant of the plea :—

Even if the defendant abandons the plea of limitation, or confesses judgment, the Court ought to dismiss the suit, if it is barred. 3 A. 846 (848); 13 C.L.R. 153 (154).

(e) Court to deal with question of limitation :—

Whether defendant takes the point or not, the Court ought to dismiss the suit or appeal, if it is barred. 10 C. 652 (658).

(f) Power to reject Appeal :—

The section only authorises an appellate Court to reject an appeal to it as barred by limitation, even though limitation is not set up as a defence by the respondent. It does not authorise it to dismiss the appeal by the respondent to the Lower Appellate Court as barred by limitation when it was presented. 15 A. 123 (F.B.)=18 A.W.N. 47 (18 A. 550).

5.—‘Shall be dismissed’ &c.—(continued).**(g) Point taken by High Court though respondent estopped :—**

Case in which the High Court in second appeal dismissed part of a suit as barred by limitation, though the defendant-respondent was estopped from taking the point of limitation. 6 M. 325.

(h) Point of limitation not urged in appeal grounds :—

(1) A party not urging a point of limitation in his grounds of appeal cannot argue it except on obtaining the permission of the Court under S. 512, C. P. Code. 13 A. 580; 15 A. 123 (F.B.).

(2) If the plea of limitation is not taken in the grounds of appeal, the appellant is not entitled to be heard on it without the leave of the Court.
2. L.B.R. (1901), 237.

(i) —arising upon facts, though not on pleadings or in grounds of appeal :—

A point of limitation———must be heard and determined by the Court.
12 A. 161 (F.B.).

(j) Delay unaccounted for .

Where the delay in obtaining copy of a decree, after it was signed, and in filing the memo of appeal after obtaining the copy of the decree, is unaccounted for, an appeal preferred after time would not be admitted.
10 C. 652.

(k) Effect of late presentation Consent of parties :

The consent of parties that a so-called appeal should be heard cannot give a Court jurisdiction to hear such appeal, when the same has been presented beyond the time prescribed by this Act. 14 A.W.N. 79.

(l) Execution application :—

It is the duty of the Court to satisfy itself whether an application for execution is or is not barred by limitation and dismiss the same if barred. 16 A. 390. 11 A.W.N. 131; 11 C. 287.

(m) When point cannot be taken by Court :—

Where an order of the Lower Court did not proceed upon a point of limitation and there was no cross-objection by the respondent, the appellate Court is not competent to deal with the question of limitation.
13 C.L.R. 89.

(n) Omission of respondent to plead limitation :—

Where a decree-holder appealed against the order of the Court of first instance, granting an application for execution of the decree, on the ground that interest was not allowed, and the judgment-debtor filed no cross-appeal setting up limitation, the appellate Court cannot dismiss the execution application as being barred by limitation. 9 C. 635.

(o) Power of Court to permit withdrawal :—

The Court may allow a plaintiff, where a suit is barred, to withdraw the suit so that he may prosecute his suit in a Foreign Court, where the same law of limitation may not be obtaining. 6 B. 103.

5.—'Shall be dismissed' &c.—(continued).**When plea to be raised.**

Act XIV of 1859 did not contain a provision so stringent as Act IX of 1871, and there was a doubt as to whether the Court could, of its own motion, take the plea and dismiss a suit or appeal though the defendant did not set up the plea, and as to the stages of a judicial proceeding when a plea of limitation could be taken for the first time. Such cases were the following :—

6 W. R. Mis. 92; 1 B.L.R.A.C. 25; 1 B.L.R.O.C. 49; 59 P. R. 1878; 12 W.R. 215; 11 B.L.R. Ap. 1=24 W.R. 1; 24 W.R. 298; 1 M.H.C. 358; 3 M.H.C. 258; 92 P.R. 1867; and 32 P.R. 1872; 2 B.H.C. 162; 4 B.H.C.A.C. 197; 2 B. 120 (F.B.).

(1) Plea of limitation, when to be raised :—

- (a) A plea of limitation may be raised for the first time in second appeal, when the facts of the case, so far as they affect that plea, are admitted or appear on the face of the proceedings. 2 U.B.R. (1897-1901), 446.
- (b) A plea of limitation cannot be entertained for the first time in second appeal, where such entertainment would involve the taking of additional evidence. 4 A.W.N. 327.
- (c) Case in which a plea of limitation taken for the first time in second appeal was disallowed. 11 B. 114 (119).

(2) Plea cannot be taken after award :—

No plea of limitation can be raised after an award. It must be presumed to have been disposed of prior to the reference to arbitration. 1 A.W.N. 17.

(3) Plea taken for the first time in appeal :—

A Court of appeal is not bound to inquire into a question of limitation not raised in the Court of first instance. 2 L.B.R. (1904) 237.

(4) ———after remand :—

The objection as to limitation cannot be taken for the first time after a remand. 8 B. 535.

(5) Raising of plea in High Court after remand :—

- (a) Though no appeal is preferred from an order of a first appellate Court reversing a dismissal on the ground of limitation and remanding the same for trial on the merits, the plea of limitation may be taken when appealing against the final decree disposing of the whole case. 5 W.R. 91 (F.B.).
- (b) So, also, when an appeal is preferred against an order of remand reversing a dismissal on the ground of limitation, the High Court may go into the correctness of the remand order on the question of limitation. 14 B. 14 (F.B.); 3 A. 675 (F.B.).

(6) Plea after execution-sale :—

A plea of limitation cannot be taken by a judgment-debtor in regard to execution-proceedings, where his property has already been sold in execution and purchased by a stranger. 6 M. 237.

5.—' *Shall be dismissed* ' &c.—(continued).

When plea to be raised.—(continued). •

(7) Effect of omission to plead limitation :—

If defendant does not plead limitation at the first stage of the case, the Court may refuse him costs. 6 M. 176 (178).

(8) Competency to take plea :—

A subsequent mortgagee, who is a judgment-debtor in a decree on a prior mortgage, is competent to raise the plea that the execution application by the prior mortgagee is barred by limitation, though the former might be benefited by the execution-proceedings. 8 C.W.N. 251.

(9) Power to reject appeal as barred :—

A Court has no power, after registering an appeal and issuing notices to the opposite side, to reject the same, at the hearing, on the ground that the same had not been presented within the period of limitation. 8 W.R. 141 (F.B).

(10) Effect of previous final decision on question of limitation :—

(a) A previous final decision on a question of limitation bars the raising of the same plea at a later stage of the same case. 8 C. 51 (P.C.) = 8 I.A. 123 = 11 C.L.R. 113 (P.C.).

(b) When once an execution application is rejected on the ground of bar by limitation and the order has become final, it will bar a fresh application for execution. 9 C. 65.

(11) Last day a Gazetted holiday :—

- Where the last day for presenting an appeal is a Gazetted holiday, appeal presented on the next day will be held to be in time though the Judge held Court on the holiday. 20 M. 469.

(12) Ignorance of accrual of cause of action :—

—, unless such ignorance is induced by the fraud of the defendant, cannot give the plaintiff a longer time for suing. 19 W.R. 269.

(13) Rejection of Appeal Memo—decree :—

An order rejecting an appeal memo as barred by limitation is a 'decree' within the meaning of S. 2 of the C. P. Code. 7 A. 42 = 4 A.W.N. 283.

(14) What the defendant ought to do :—

Where a suit, which ought to have been dismissed by the Court itself on a question of limitation is not so dismissed, the defendant must, in order to raise the question of limitation in appeal, appeal on the whole case. 6 C.L.R. 267.

See 1 A. 644 noted under S. 12 *infra*.

6.—' *When his application to sue as a pauper is filed.* ' •A.—Application to sue in *forma pauperis* :—

1. Where, in the case of an application to sue in *forma pauperis*, it is neither rejected nor admitted, but the applicant, after objection by the defendant to *pauperism*, pays stamp-duty on the plaint, of his own accord, and wishes to continue the suit as an ordinary suit, the suit will be considered as instituted on the date of the original presentation of the application in *forma pauperis*. 2 A. 241 (P.C.) = 6 I.A. 126 (P.C.) ; 28 C. 427 (dissenting from 18 A. 206) ; 59 P.R. 1903 = 129 P.L.R. 1903,

6.—‘When his application to sue’ &c.—(continued).

2. But see 18 A. 206--16 A.W.N. 33, which holds that such a suit must be considered to have been instituted on the day the court-fee was paid, *distinguishing* 2 A. 241 (P.C.) 6 I.A. 126 (P.C.), on the ground that that was a case governed by the old C. P. Code of 1859: This case refers to 12 A. 129 (F.B.); 15 A. 65 (F.B.) and 17 A. 526.
3. If an application to sue *in forma pauperis* is rejected and the full court-fee is paid after the expiry of the period limited for the suit, the suit will be considered as instituted on the date the court-fee is put in and, as such, barred. 24 C. 889.
4. So, also, in a case where, an application to sue *in forma pauperis* being rejected, the applicant takes time to put in the court-fee and when the court fee is paid the period of limitation has run out. 20 B. 508.
5. Compare 2 C. 339, which holds that the explanation to S. 4 applies only in cases where the application to sue *in forma pauperis* is numbered and registered as a suit. [It should be noticed that this decision was before 2 A. 241 6 I.A. 126 (P.C.) noted above].
6. A pauper suit commences, for purposes of limitation, from the day the application to sue *in forma pauperis* is put in, and not on the day it is numbered and registered as a suit. 4 B.L.C.A.C. 39.

B.—Application for leave to appeal *in forma pauperis*:—

1. Where an ——— is rejected, a regularly stamped appeal, presented beyond the time proscribed for the appeal, cannot be considered to have been put in on the date of the application for leave to appeal *in forma pauperis*. 18 A. 305.
2. (a) But, when during the pendency of such an application, the appellant offers to pay Court-fee and takes time from the Court to pay the stamp without any objection on the part of the respondent, and pays the stamp within the time granted, though beyond the period of limitation, his appeal will be considered as presented on the date of the application for leave to appeal *in forma pauperis*. 26 C. 925; see also 21 B. 576 on a similar point.
- (b) So, also, where the Court, in rejecting the application, grants time to the applicant to pay stamp and proceed in the ordinary way. 22 B. 819.

5. If the period of limitation prescribed for any suit,⁽¹⁾ appeal or application expires on a day when the Court is closed,⁽²⁾ the suit, appeal or application may be instituted, presented or made on the day that the Court reopens;⁽³⁾

⁽¹⁾ Proviso where Court is closed when period expires.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court⁽¹⁾ that he had sufficient cause⁽⁵⁾ for not presenting the appeal or making the application within such period.

Provide as to appeals and applications for review.

(Old Acts) •

[S. 5, Act IX of 1871. Same as above.

Act XIV of 1859 contained no provision corresponding to S. 5 of the present Act.]

(Notes)

Scope of Section.

- (1) This section cannot be applied in making the computation provided for by S. 12 and does not become applicable until after such computation has been made. 12 A. 461 (F.B.) 10 A.W.N. 149.
- (2) **Criminal Appeals :—**
The section is applicable to Criminal appeals. 11 A. 10.
- (3) **Appeals :—**
 - (a) ——— does not include an application to appeal *in forma pauperis*. 30 C. 799; 12 A. 79 = 10 A.W.N. 25; 2 M. 230; 1 A.W.N. 130; 12 A. 461 (487) = 10 A.W.N. 149 (F.B.)
 - (b) Nor does it include an application for leave to appeal to the Privy Council. 10 B. 301; 1 A. 644; 15 A. 14.
- (4) **Memo of objections :—**
 - (a) The section does not apply to the notice of memo of objections under S. 561. C.P.C. 9 C. 631.
 - (b) A Court had no discretion to extend the period of seven days, prescribed by the old S. 561, C.P.C., (before Act VII of 1888), within which notice of objections to a decree by a respondent had to be given, the provisions of para 2 of this section not applying to such a case. 7 C. 654 = 9 C.L.R. 266.
- (5) **Presentation after hour fixed :—**
An appeal, otherwise properly presented, will not be too late simply because it was presented after the hour fixed by the Judge of the Court for the reception of papers. 140 P.R. 1884.
- (6) **Letters Patent Appeals :—**
must be brought within 90 days from the date of the judgment appealed from, in accordance with Rule 1 of the Rules of practice of the N.W.P. High Court. Such rule not *ultra vires*. 9 A. 115 (F.B.); 8 A.W.N. 37 (F.B.) [following 5 B.L.R. 47; 2 A. 192 (F.B.)].

1.—Prescribed for any suit.

- (1) The expression ——— means the period prescribed by this Act for the institution of suits, &c. 5 B. 688.

1.—‘*Prescribed for any suit.*’—(continued).

(2) Time for security under S. 502, C.P.C. :—

The Court has a discretion in extending the———on sufficient cause being shown. 10 C. 557 (P.C.)= 10 I.A. 7 (P.C.)

(3) Deposit of translation fees :—

The Court has no power to excuse delay in the deposit of fees for translation of records to be submitted to the Privy Council and grant an extension of time. 2 C. 128; 23 W.R. 220.

Applicability of section to suits under Special or Local Acts :—

[(N.B.)—In addition to the cases noted here, reference may also be made to those noted under S. 6, *infra*, under the heading “Applicability of Act to cases under special or local Laws.”]

(1) Proceedings under the C. P. Code :—

———not being proceedings under any special or local law, are governed by the general limitation law. 1 C. 226 (P.C.)=3 I.A. 7=25 W.R. 285 (P.C.).

(2) Registration Act (III of 1877) :—

(a) The provisions of this section apply to suits instituted under S. 77 of —. 8 C. 910=10 C.L.R. 333; 74 P.R. 1890 (F.B.).

But see 20 M. 249=7 M.L.J. 94, noted below.

(b) The provisions of the section are inapplicable to suits brought under the Registration Act. 20 M. 249=7 M.L.J. 94 (following 18 M. 99, F.B.)

Cf. 12 M. 467, noted under S. 14 *infra*.

(3) Suits &c. under N.W.P. Rent Act (XII of 1881) :—

(a) This section is applicable to Rent Suits under the N.W.P. Rent Act (XII of 1881). 23 A. 277 (*dissenting* from 21 A. 22).

(b) also to applications under the Rent Act. 13 A.W.N. 117.

(4) Act VIII of 1869 (Bengal Rent) :—

Tho’ a suit to recover moneys or obtain papers or accounts from an agent must, under S. 30 of Bengal Act VIII of 1869, be instituted within one year from the determination of the agency, yet, if on the last day of such year the Courts be closed, it may be filed on the day of the re-opening of the court. 5 C. 314; 7 C. 690.

(5) Act VIII of 1885 (Bengal Tenancy) :—

A judgment-debtor, wishing to apply for the setting aside of a sale held under the above Act, may deposit the amount required to be deposited under the section, on the day of the re-opening of the Court, if the last day for the deposit happens to be a holiday and the Court is closed. 18 C. 281 (5 C. 906).

(N.B.)—This case has been decided on general principles, and not by reason of S. 5 of the Limitation Act.

1.—'Prescribed for any suit.'—(continued).

(6) Act V of 1882 (Madras Forest):—

The provisions of this section are applicable to an appeal under—
10 M. 210.

(7) Suits under Act 28 of 1860 (Madras):—

The provisions of the section are inapplicable to a suit under Madras Act 28 of 1860 (Boundary). 8 M. 92.*

Compare this case with 12 M. 467 noted under section 14 *infra*.

(8) Burma Courts Act:—

The provisions of section 5 do apply to an appeal for which a special period is provided by the Burma Courts Act. L.B.R. (1872-1892), 338.

(9) Oudh Rent Act:—

Section inapplicable to suits under the Oudh Rent Act. If a suit is barred during holidays and filed on the re-opening day, this section cannot save limitation. 4 O.C. 182 (F.B.).

2.—'When the Court is closed.'

(1) Extension of time when Court is closed:—

When parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. 18 C. 631.

(N.B.)—This case has been decided on general principles.

(2) Act VIII of 1869 (Bengal):—

Where the 15 days allowed by S. 52 of the Act for making a deposit of the decree amount into Court expired during holidays, the Court permitted the same to be made on the re-opening day. C.C.L.R. 289.

(N.B.)—This case was decided on general principles and not under S. 5 of the Limitation Act.

(3) Vacation—Court opened for reception of papers:—

(a) When the Court is closed for the vacation and arrangements are made for the reception of papers, the exceptions in the section would not apply to a suit or appeal presented on the re-opening day, the period of limitation therefor having expired during the vacation. 5 M. 189 (F.B.); 13 M. 447.

(b) Case where the High Court refused to receive a security bond on the re-opening day after a vacation, the time fixed by the Court for the furnishing of the security having expired during the vacation, the reasons being that the Limitation Act was not applicable and the Court was open during the holidays for transaction of business of this kind. 3 A.W.N. 254.

* This case is under Act IX of 1871, S. 6 of which differs in wording from that of S. 6 of the present Act (see 10 M. 210).

2.—‘*When the Court is closed.*’—(continued).(4) **Review of Judgment:—**

The time during which the Court is closed for vacation cannot be excluded in computing the eighty-nine days within which an application for — can be put in on half stamp. 9 M. 134.

(5) **Deposit of pre-emption amount:—**

If the last day for — under S. 214, C. P. Code, be a Sunday, the deposit will, if made on Monday following, be in time. 3 A. 850.

(6) **Pre-emption Suit:—**

Where a deposit could not be made on the last day fixed, the same being a close holiday, the deposit made on the next re-opening day was held to be in time. 4 A.W.N. 217.

(7) **Memo of objections:—**

may be filed on the re-opening day, if the time for filing the same expired on a day the Court was closed. 4 A. 430.

(8) **Close holiday:—**

The holding of a judicial proceeding on a close holiday is an irregularity, and a party may either waive the irregularity or get the proceeding cancelled if he had not waived the irregularity. 9 A. 366.

(9) **Close holidays—Return of plaint:—**

Where, in consequence of holidays, a plaintiff institutes his suit (time for which had expired during the holidays) on the re-opening day of a Court, which Court returns the plaint later on for presentation to the proper Court, the plaintiff will not be entitled to a deduction of the holidays in computing the time for his suit in the latter Court. 24 W.R. 26.

(10) **Holidays—Suit or Appeal:—**

(a) If time expires during holidays, the suit or appeal will be in time if presented on the re-opening day. 30 P.L.R. 1903.

(b) When time for an appeal expires during the holidays, the appellant can have it admitted on the re-opening day. 6 B. 487.

(c) If the Court be closed for the vacation on the last day of limitation for an appeal, the appeal filed on the re-opening day will be in time. 1 A. 263.

*(11) **Christmas Holidays:—**

(a) — are close holidays, and they ought to be excluded in favor of suitors. 27 B. 31.

(12) **Application for copies:—**

If the time for preferring an appeal expires during holidays, and an application for copies is made on the re-opening day, the appellant will be entitled to deduct the time requisite for obtaining the copies. 2 Bom. L.R. 221; 25 B. 586; 3 Bom. L.R. 244; 19 A. 342.

2.—‘When the Court is closed.’—(continued).**(13) When decree becomes final :—**

A decree appealable to the High Court does not become *final*, if the last day for appealing falls during the vacation of the High Court, until the re-opening of the High Court. 7 A. 107—4 A.W.N. 223 (*following* 1 A. 132).

(14) Acknowledgment of liability during holidays :—

Acknowledgment given after three years (the period of limitation) from the date of a bond but while the right to sue subsisted, owing to the intervention of the vacation during which the Courts were closed, does not save limitation. 26 B. 782 4 Bom. L.R. 608.

(15) Unauthorized closing of Court :—

Even if on the last day the Court was closed in an unauthorized manner, the plaintiff will be entitled to present his suit on the next Court day and his suit will not be barred on that account. 8 W.R. 73.

(16) Cases under Act XIV of 1859 :—

(a) A suit would be barred if the time therefor expired on a holiday. 3 W.R. 209. *Ibid*, S. C. Rulings 5 and 6—B.L.R. Sup. vol. 360; 20 W.R. 167.

(b) Case where, Courts having been closed when the time for a suit expired, its institution on the re-opening day was held to be in time. 3 W.R. 46.

3.—‘On the day that the Court re-opens.’**Re-opening of Court :—**

—means the actual opening of Court for business. Even if the Court should reopen on a day later than the one fixed originally for re-opening, the suitor will be in time if he comes in on the day on which the Court actually re-opens. 1 A. 263.

4.—‘Satisfies the Court.’**(1) Evidence of sufficient cause :—**

A party seeking the benefit of this section ought to place before the Court satisfactory evidence by means of affidavit or otherwise, of the cause of delay. 13 A.W.N. 26.

(2) Record of reasons :—

Before admitting an appeal beyond time, the Court should be satisfied as to the sufficiency of the cause for non-presentation within time, and the reasons for admitting it beyond time *must be recorded*. 1 A. 250; 1 P.R. 1883; L.B.R. (1872-1892), 500.

5.—‘Sufficient Cause.’**(1) Meaning of the words :—**

These words ought to receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of good faith is imputable to an appellant. 13 M. 269; 4 O.C. 372.

5.—'Sufficient Causes.'—(continued).

A.—What are———?

(2) Cause of delay, when to be stated :—

An appellant, wishing to seek the benefit of this section or S. 5A, must state the cause of the delay at the time the appeal is filed. 22 P.R. 1903.

(3) Rehearing of appeal—Extension :—

A Court has no discretion to extend the period of 30 days prescribed by Art. 169 for an application for re-hearing of an appeal heard *ex parte* in the absence of the respondent. 66 P.R. 1885.

(4) Appeal against amended decree :—

Where a decree is amended, an appeal may be preferred against the amended decree, though the appeal against the original decree may be barred by limitation. No application for revision can lie. 24 M. 646.

(5) Illness :—

A plea of——— to serve as a sufficient cause for the non-presentation of an appeal in time must be supported by proof of the strongest kind of utter disability to attend to any duty. 2 U.B.R. (1897-01), 451.

Compare 1 W.R. Mis. 23 under the next heading.

A.—What are sufficient causes?

(1) Change of practice of Court :—

Change of practice of a Court in the matter of receiving appeals and the want of notice of such change to a party. 101 P.R. 1890.

(2) Calling for additional folios :—

Delay caused by Court's calling for additional folios and party's supplying the same. 3 C.W.N. 55

(3) Bona-fide error as to remedy :—

(a) Where, instead of appealing against a decree, a person filed a suit, *bona fide* thinking that it was the proper course and, soon after he found out the error, preferred the appeal, the appeal should be admitted, there being sufficient cause for not appealing in time. 161 P.R. 1888.

(b) A *bona fide* belief that a certain case was one for revision, and not for appeal, and the prosecution of a revision petition. 5 O.C. 183.

(c) An appeal wrongly filed as from an order, instead of as from a decree, is a sufficient cause. 1 A.W.N. 97.

(d) In this case, pendency of proceedings in revision was considered a sufficient cause, the appellant having believed that a revision was his appropriate remedy but the High Court having in revision held that an appeal would lie. 5 A. 591=3 A.W.N. 142.

(e) Delay in filing an appeal against the original order dismissing a suit may be excused, if there was an application for an order to set aside a dismissal by default and such application was dismissed. 89 P.R. 1903.

5.—‘Sufficient Causes.’—(continued).**A.—What are——?—(continued).****(4) Pendency of revision proceedings :—**

—— before the Special Judge under the Dakhn Agriculturists' Relief Act, (the application being finally rejected as without jurisdiction) may, under certain circumstances, constitute sufficient cause for delay in the presentation of an appeal to a District Judge. 9 B. 452.

(5) Withdrawal of appeal :—

(a)—— by appellant, is a sufficient cause for the respondent, who had filed cross objections, to prefer an appeal concerning the matter of the cross-objections, though such appeal is barred by time. 23 B. 692—1 Bom. L. R. 768.

But see next case, 12 C.L.R. 395.

(b) Where an appeal is withdrawn, no leave to appeal ought to be given to the respondent, who had filed cross-objections, unless he can satisfy the Court that he was ready to appeal and would have done so within proper time if the appellant had not preferred an appeal. 12 C.L.R. 395.

(6) Proceedings to get one's self declared of age :—

Time occupied by a party in taking proceedings to get himself declared a major, may be excused in the presentation of an appeal beyond the prescribed period. 21 P.R. 1904.

(7) Imprisonment :—

—— in Criminal jail. 21 P.R. 1904.

(8) Attachment of Appeal memorandum :—

The attachment of an appeal memorandum stamped and kept in readiness for presentation in Court. 2 U.B.R. (92—96), 452 (9 A. 11 and 655) ; 13 C. 78.

(9) Neglect of ward's interest by guardian :—

Case where leave to appeal was granted to a ward after his attaining majority, though beyond time, the guardian not having protected his interest during minority. 20 B. 104.

(10) Presentation to a wrong Court—Bona fide mistake :—

(a) The presentation of an appeal to a wrong Court under a *bona fide* mistake is “sufficient cause.” 21 B. 552.

(b) An appellant having preferred an appeal to the Court of the District Judge and *bona fide* prosecuted it—it being doubtful whether the appeal lay to the District Judge or to the High Court—is entitled to a deduction of the time during which the appeal was pending in the Court of the District Judge. 23 C. 526.

(11) Treasurer's Certificate :—

• • The production of the Treasurer's Certificate, after time, to the effect that a single stamp of the denomination required for an appeal was not available on the date the appeal was presented, is a sufficient cause
7 A.W.N. 212, •

5.— '*Sufficient Causes.*'—(continued).

. A.—What are ———?—(continued).

(12) **Court's admitting and filing appeal without objection:—**

The Court's granting time (without any objection on the respondent's part) to a pauper appellant to pay Court-fee within a time fixed and filing the appeal, on such payment. 26 C. 925.

(13) **Mistake:—**

Where, through some mistake, the name of a wrong person was entered as that of the respondent, and the mistake was duly rectified beyond time, but before the hearing of the appeal, the appeal was properly admitted though the rectification was made after time. 8 A.W.N. 58.

(14) **Delay in office:—**

A——— in the grant of copies. 10 A.W.N. 10.

(15) **Time for obtaining copy of Decree:—**

The whole time required to obtain a copy of the decree should be deducted in computing the period of limitation for preferring an appeal. 7 C.W.N. 109, (*Distinguishing* 12 C. 30).

(16) **Insufficiently stamped appeal:—**

Where an appellant, whose memo. of appeal had been declared by the taxing officer of the Court to be insufficiently stamped, applied for relief under S. 3, Act VI, 1892, he is entitled to such relief notwithstanding the provisions of S. 5 of Act VII, 1870, if, as a fact, the stamp is correct. 13 A.W.N. 45.

(17) **Close of Court for Civil business:—**

Close of an appellate Court for Civil business by a Gazette notification and the expiry of time for an appeal during such period. 29 P.R. 1891.

(18) **Substitution of appellants:—**

The Court can allow the right person to be substituted as a party, to prosecute an appeal instituted in the name, and on behalf, of a wrong person, is the right person can bring the case within S. 5. 4 C.W.N. 58.

(19) **Return of appeal by Chief Court:—**

Where, in a second appeal, the Chief Court returned the appeal on the ground that the Divisional Court, that heard the first appeal, had no jurisdiction, with a direction to re-present the first appeal to the Chief Court through the Divisional Court and it was so done after the period of limitation: held there was sufficient cause. 66 P.R. 1891 (*following* 183 P.R. 1888 (F.B.)).

(20) **Neglect of Court officials:—**

Delay in the grant of copies owing to the neglect of Court officials in issuing notices re preparation of copies. 12 A. 105.

(21) **Application for review:—**

(a) The pendency of an ——— will be a sufficient cause, if it was made within a reasonable time and with due diligence, and if the appeal were preferred diligently immediately after the termination of the proceedings for review. 22 W.R. 79; 7 W.R. 529 (F.B.); 183 P.R. 1888 (F.B.); 89 P.R. 1882; 166 P.R. 1883; 13 L.R. Sup. Vol. 728; 2 W.R. Mis. '35.

5.—‘Sufficient Causes.’—(continued).**A.—What are——? (continued).**

(b) Time occupied by the pendency of an application for review may, in the absence of special circumstances, be excluded. But a party ought not to allow the time for appeal to expire and then revive that right by first applying for a review. L.B.R. (1893—1900), 515.

(22) Review :—

(a) Application for——filed after time, the last day being a holiday: —Full fee to be paid in the first instance. The Court may refund half the amount if satisfied that the delay in applying was not due to the laches of the applicant. 9 C.L.R. 479.

(b) An application for——filed after the eighty-ninth day must be on full stamp, even though the last day expires during holidays. 9 M. 134.

(23) Rejection of Application to appeal in forma pauperis—Regular appeal :—

(a) Where a person presented an unstamped appeal memorandum and a petition for leave to appeal as a pauper and the latter was rejected, the former can be admitted, if properly stamped subsequently, though beyond time. 22 B. 849.

(b) Prosecution of an application for leave to appeal as a pauper, which application is finally rejected, is a *sufficient* cause for presentation of a regular appeal after time. 47 P.R. 1899.

(c) Where, on an application by a *purdahnashin* lady to appeal as a pauper being dismissed on the ground that it was barred by limitation and on an *ex parte* order being passed, subsequently, giving permission under this section to file an appeal on full stamp paper, the lady preferred the appeal on stamp paper but more than two years after time, held, by *Tyrrrell, J.*, that the appellant had made out a sufficient case for the exercise of the Court's discretion under this section. (Mahmood, J. dissenting). 6 A.W.N. 245 = 9 A. 11.

(N.B.)—But this decision was upset on a Letters Patent Appeal—*vide* 9 A. 655 = 7 A.W.N. 185.

• 24) Counsel's omission to show document :—

Where the plaintiff's counsel did not show the document on which he relied to

- the defendant's counsel, who relied upon the statement of the former as to the effect of the document, and an application by the defendant to review the decree against him on discovery of the real effect of the document, was made, the above circumstance held to be justified, though the application was beyond time. 11 C. 767.

(25) Application to set aside an abatement order :—

- • An——in execution by an executor, may be admitted after time if there were satisfactory reasons preventing the executor from continuing the execution-proceedings started by the testator, (*e.g.*) his waiting till the grant of probate, which was contested. 39 P.R. 1903.

5.—‘Sufficient Causes.’—(continued).

A.—What are——? (continued).

(26) Petition under S. 108, C.P.C. :—

Time occupied by a petition under S. 108, C.P. Code, under the erroneous belief that a decree was an *ex parte* decree, may be excused, when a regular appeal against the original decree is put in. 21 P.R. 1904.

(27) Translation of judgment :—

Extreme delay in furnishing—145 P.R. 1888.

(28) Illness of Mukhtar :—

The illness of his Mukhtar and the client's ignorance of it. 9 M.I.A. 26 (P.C.).

(29) Mistake of law :—

(a) A—due to an honest, though mistaken, belief formed with due care and attention is a “sufficient cause.” If not formed with due care and attention, it will not be. 18 M. 269; 8 O.C. 265.

(b) *Bona fide*—is a sufficient cause. 19 A. 348 (F.B.).

(N.B).—This was a case under S. 14.

(c) A *bona fide* mistake of law as to jurisdiction. 2 O. C. 133.

(30) Ignorance of law :—

(a) Ignorance of law unaccompanied by negligence, inaction or “want of *bona fides*” will be ‘sufficient cause’ within the meaning of this section. 18 M. 269; 8 O.C. 13.

(b) It cannot be laid down as a general proposition that—is not a sufficient cause under any circumstances; but the principle that ignorance of law is no excuse can be departed from only under very special circumstances. 81 P.R. 1886 (F.B.).

(c) Case in which—was considered as sufficient cause. 43 P.R. 1889.

(d) Presentation of an appeal to a wrong Court in ignorance of the provisions of law. 184 P.R. 1889.

(31) Misleading order of Court :—

Where the Court directed the appellant to make up the deficiency in stamp within a certain time and the appellant paid the additional stamp within the time given but after the period of limitation for the appeal, the appeal should be admitted as the appellant was misled by the order of the Court. 10 A.W.N. 122 (*distinguishing* 12 A. 129).

(32) Discretion to extend time :—

The Court has a discretion to extend the time allowed by the Rules of Court, Chap. 6, Rule 6, for a motion to vary the report of a Commissioner for taking accounts. 9 B. 250.

B.—What are NOT——?

(1) Filing appeal in wrong Court :—

———knowing the right Court to which the appeal lay; where in such a case, the wrong Court dismisses the appeal and the appeal is sought to be presented to the right Court after time, the latter Court will not deduct the time occupied by the appeal in the wrong Court. 28 B. 235—5 Bom. L.R. 947.

5.—'Sufficient Causes.'—(continued).

B.—What are NOT———? (continued).

(2) Previous application in wrong Court:—

Pendency of previous application for execution in a Court which had no jurisdiction to execute it. 24 W.R. 405.

(3) Appellant's persisting in wrong course:—

An appellant's persisting in appealing from a decree as if it were from an order, though his attention was called to his erroneous course is not 'sufficient cause.' 15 A.W.N. 242; But see 1 A.W.N. 97.

(4) Error of a subordinate official:—

A party misled by the error of a subordinate official granting copy of judgment, and not by any order or judgment or practice of the highest Court in the Province, cannot claim the benefit of this section. 1 O.C. 47.

(5) Mistake of Counsel:—

in failing to read the contents of a deed is no sufficient cause for the admission of an application for review after time. 13 C. 62.

(6) Negligence of Pleader:—

Want of due care and attention on the part of a Pleader or Pleaders engaged by an appellant in jail in seeing to the proper presentation of an appeal. 4 Q.C. 303 (B).

(7) Negligence of Lawyer's Clerk:—

——— in not carrying out his master's orders and not filing an appeal in time or not making over the appeal to another Lawyer is not a sufficient cause for the admission of an appeal beyond time. 2 U.B.R. (1892—96), 450.

(8) Time for legal advice and raising funds:—

Time spent in taking legal advice and procuring funds do not amount to sufficient cause. 5 O.C. 183.

(9) Erroneous legal advice:—

is not a sufficient cause. 5 O.C. 384; 30 P.R. 1886.

(10) Mistake in computing time:—

A——— is not a sufficient cause. 2 U.B.R. (1892—1896), 456.

(11) Delay in getting return of records:—

——— from the Revenue Courts is not a sufficient cause in a suit for declaration of right to office of Kurnam and for recovery of emoluments brought by a dismissed Zemindari Kurnam. 11 M.L.J. 406.

(12) Poverty:—

is not a sufficient cause for the admission of an appeal after time. 13 C. 78; 9 A. 665 (F.B.)—7 A.W.N. 185; 9 A. 11—6 A.W.N. 345.

5.—‘Sufficient Causes.’—(continued).

• B.—What are NOT———? (continued).

(13) Appellant being a woman :—

The fact of the ———, a widow and not in very good circumstances is not a sufficient cause for the admission of an appeal after time. 3 C. P.L.R. 125.

(14) Pardanashin lady :—

Appellant being a ———. 9 A. 655 (F.B.). 7 A.W.N. 185.

(15) Negligence, carelessness or want of means :—

is not a sufficient cause for delay. 12 A. 461.

(16) Illness :—

A mere plea of ——— is not sufficient cause. 1 W.R. Mis. 23.

(17) Application for leave to appeal as a pauper :—

(a) A pauper appellant applying for leave to appeal has not the same indulgence as to delay as regards presentation of his application for leave as a person not a pauper has as regards his appeal. 2 M. 230.

(b) An ——— which is itself too late cannot afford a sufficient cause for the excuse of delay in presenting a regularly stamped appeal. 6 Bom. L.R. 373.

(c) More presentation of an application to appeal *in forma pauperis* and rejection of the same is no sufficient cause for a duly stamped appeal being presented after time. 159 P.L.R. 1901.

(18) Ex parte decree, appeal against :—

Where an application to set aside an ex parte decree failed, the period occupied in this proceeding cannot be deducted in computing the period of limitation for an appeal against the original decree. 23 C. 325.

(19) Personal excuse of one of several appellants :—

An excuse personal to an appellant who is not jointly interested in certain matters with the other appellants cannot save the appeal from limitation so far as the others are concerned in respect of such matters. 25 B. 699 = 3 Bom. L.R. 400.

(20) Appeal by a convict :—

The fact that a convict in jail thought that he had no right of appeal and that his relatives would appeal if he had a right is not a sufficient cause. 11 A.W.N. 10.

(21) Omission to add parties in appeal :—

Where a person does not show sufficient cause for not prosecuting an appeal, within the period prescribed, by the addition of any party omitted or otherwise, his appeal cannot be sustained. 10 C. 445.

(22) Withdrawal of appeal—Cross-objections :—

A ——— by an appellant is not a sufficient cause for the respondent to prefer a regular appeal beyond time as regards his cross-objections. 16 B. 249; 10 B.H.C. 397.

5.—‘Sufficient Causes.’—(continued).

. B.—What are NOT——? (continued).•

(23) Rejection of cross-objections :—

Where, in an appeal by one of several defendants, the plaintiff-respondent preferred cross-objections seeking to make the non-appealing co-defendants liable, and such cross-objections were disallowed, permission to put in a regular appeal, after expiry of time therefor, against the non-appealing co-defendants was refused. 30 C. 655 (659).

(24) Pendency of an appeal—Review of judgment :

The —— is no sufficient cause for the presentation of an application for a review of judgment after time. 8 B. 200.

(25) Pendency of a Second appeal :—

is not a sufficient cause for delay in applying for review of judgment. 9 W.R. 301.

(26) Review of Judgment :—

(a) Time occupied by an application for —— cannot be excluded from time for appeal as a matter of right. 14 M. 81; 7 M. 584; 15 W. R. 61.

(b) If, however, the proceedings for review had been prosecuted with due diligence and there had been a reasonable prospect of success, thereby avoiding the necessity for an appeal, the time may be excluded. 7 M. 584; and see cases Nos. 21 and 22, under heading *A supra*.

(c) The mere presentation of an application for ——, where it is not shown that the grounds therefor are reasonable and proper is not a ‘sufficient cause’ of delay. 15 C. 242; 18 B. 84.

(d) Where an applicant for review allowed a long period to elapse (more than 3 months) before he filed the application, *held*, that there was no sufficient cause for excusing the delay, notwithstanding that there were extenuating circumstances. 4 A.W.N. 330.

(27) Ignorance of law :—

(a) Mere ignorance of law cannot be recognised as a sufficient reason for delay. 12 B. 320.

(b) Presentation of an appeal to a wrong Court in ignorance of law is not a ‘sufficient cause’ for admitting the same appeal beyond the period of limitation in the proper Court. 10 A. 524; 8 A.W.N. 218; 10 A. 587.

(28) Mistake of law :—

(a) A —— due to an honest, though mistaken, belief formed with due care and attention, is a ‘sufficient cause.’ If not formed with due care and attention, it will not be. 3 O. C. 265.

(b) is not a sufficient cause—Per *Mahmood, J.*—12 A. 461 (F.B.)

(29) Alteration of view of law :—

• (a) A new exposition of the law by a Full Bench ruling or a Privy Council decision is not a sufficient cause for delay in appealing or applying for review. 9 W.R. 181 (F.B.); 18 W.R. 317; 19 W.R. 189; 5 B.H.C. 107; 2 A. 287.

5.—'Sufficient Causes.'—(continued).

* B.—What are NOT——? (continued).

- (b) A new statement of the law by a High Court is not a sufficient cause for delay in appealing or in applying for a review of judgment. 10 W.R. 178—2 B.L.R.A.C. 184 (Note).

(30) Ignorance of effect of a judgment:—

An —— is no sufficient cause for the late presentation of an application for review. 8 B. 260.

(31) Pendency of appeal in one of two similar suits:—

Where, in two suits brought at the same time by executors raising the same questions of construction in respect of the same will, similar decisions were given and one of the defendants in one suit preferred an appeal with the result that the decree in that suit was reversed, subsequent application by plaintiff for leave to appeal from the decree in the other suit after time therefor had expired, was not allowed, notwithstanding that they were executors, on the ground that there was not sufficient cause for the delay. 14 B. 365.

(32) Return of plaint and re-presentation in wrong Court:—

The dismissal of a suit on the ground of want of jurisdiction and return of the plaint for presentation to the proper Court and the prosecution of the suit in another Court, which also being one without jurisdiction rejected it, is no sufficient cause for admitting an appeal beyond time from the original order of dismissal and return of plaint. 115 P.R. 1881.

'Exercise of discretion.'

(1) Grant of time to appeal:—

If, on dismissing an application to appeal *in forma pauperis*, a Court grants time to the appellant to stamp the appeal, it exercises its discretion in admitting the appeal after time in a reasonable manner. 11 C.P. L.R. 3.

(2) Granting time to file regular appeal:—

- (a) When, on the dismissal of a petition for leave to appeal *in forma pauperis*, the Court grants time to the appellant to file a regular appeal, and such time happens to be beyond the period of limitation prescribed for the appeal, it is an exercise by the Court of a discretion vested in it under this section. 26 A. 329—A.W.N. (1904), p. 24 (approving 22 B. 340).

- (b) The discretionary power vested by this section might be exercised as well by the Court to which an appeal had been transferred as by the Court to which it was originally presented. 17 A.W.N. 15.

- (c) Where copy of a decree was not presented with the memo of appeal but was presented, after the period of limitation for the appeal had expired, with an affidavit explaining the delay, and was accepted by the Court, such acceptance must be taken to have been made in exercise of the discretionary power vested by this section. 17 A.W.N. 15.

5.—‘Sufficient Causes.’—(continued).**‘Exercise of discretion.’—(continued).**

(d) The admission of an appeal after time is purely discretionary with the Appellate Court, having regard to the particular facts established before it. 13 C. 266.

(e) If an appeal is out of time owing to delay in obtaining a copy of decree, the Court may excuse the delay and admit the appeal. 7 C.W.N. 109 (3 C.W.N. 55).

(3) Second appeal :—

(a) If a lower appellate Court has exercised its discretion, after perfect enquiry and due consideration, in a sound and reasonable manner, the second appellate Court cannot interfere with the discretion, however wrong the conclusion may be; but, if the lower Court acted arbitrarily, capriciously, or with prejudice, or exercised its discretion without any legal material to support it, such exercise of discretion is liable to review or appeal. 3 O.C. 97; 23 B. 513; 6 B. 304; 7 W.R. 337; 25 A. 71; 26 A. 327 = A.W.N. (1904), 23; 106 P.R. 1885.

(a-1) The High Court has power, in second appeal, to look into the grounds which a Judge in the lower appellate Court has given for admitting an appeal beyond time. 8 C. 251; 2 B.L.R.A.C. 184 (Note)=10 W.R. 178; 11 C.L.R. 177.

(b) A mere difference in view as to the mode in which the discretion conferred by this section ought to have been exercised is in itself no ground for interference by the High Court in second appeal. It ought to be satisfied that the exercise of the discretion was judicially unsound. 25 M. 166; 9 A. 244 (246) = 7 A.W.N. 29.

(c) Where facts having a material bearing on the exercise of discretion have not been considered, the exercise of discretion is judicially unsound and the second Appellate Court will correct the error. 11 M.L.J. 406.

(d) But, where the lower appellate Court failed to exercise its discretion in a sound and reasonable way, the superior Court would interfere; also, where the lower appellate Court admits an appeal after time on insufficient grounds. 92 P.R. 1836.

(e) Case in which the Privy Council refused to interfere with the discretion of the High Court in refusing to admit an appeal beyond time, not being satisfied that the High Court was wrong in the exercise of its discretion. 30 C. 309 (P.C.)

(f) A Court failing to give an appellant any opportunity to substantiate his allegation as to the cause of delay in presenting an appeal fails to exercise the judicial discretion vested in it by this section. 8 A.W.N. 126.

(g) Case in which the Privy Council reversed an order of a High Court in India granting review of judgment after a very long delay. 7 M.L.A. 283 (P.C.).

(4) Appeal dismissed for default :—

Where an appeal dismissed for default is restored to file, the party affected can contend in a higher appellate Court that the order dismissing the appeal for default became final, as no application for restoration was made till after the expiry of 30 days from the date of dismissal thereof. 44 P.R. 1832.

5.—‘Sufficient Causes.’—(continued).

‘Ex parte admission of appeal—Remedy.’

(1) **Ex parte admission, effect of:—**

(a) The order for admission of an appeal under S. 5 made before issue of notice to respondent, is an *ex parte* order and cannot bind him. He may question the order at the hearing, and the Court may set it aside. 14 B. 594; 9 M. 450; 5 C. 1; 1 A. 34; 13 W.R. 245; 1 A.W.N. 88.

(b) If the appeal comes on for hearing before a Subordinate Court to which it is transferred, the latter Court may also set aside the *ex parte* order admitting the appeal. 21 M. 228=7 M.L.J. 188; 2 C.W.N. 461; 8 C. 251.

But see 5 C. 1, which holds that a Subordinate Court to which the appeal is referred cannot set aside the order.

(2) **Power of Court hearing appeal:—**

A Bench hearing an appeal is competent to set aside an *ex parte* order admitting an appeal beyond time. 6 A.W.N. 245=9 A. 11; 1 A. 34 (F.B.).

***5 A.** Whenever it is shown to the satisfaction⁽¹⁾ of the Court that an appeal or an application for a review of judgment was presented after the expiration of the period of limitation prescribed for such appeal or application owing to the appellant or applicant having been misled by any order, or practice, or judgment of the High Court of the Presidency, Province or District, such appeal or application, if otherwise in accordance with law, shall for all purposes be deemed by all Courts to have been presented within the period of limitation prescribed therefor.

Limitation for certain appeals or applications for review of judgment.

(Old Acts)

(N.B.)—Neither of the two previous Acts contained a provision similar to this section.

(Notes)

Scope of Section.

This section is, like S. 14, a mandatory one; but it does not exclude the discretionary power of the Court, under S. 5, to excuse delay in presenting an appeal. 20 B. 736.

1.—‘Shown to the satisfaction of the Court.’

Production of evidence:—

A party seeking the benefit of this section ought to place before the Court evidence, by means of affidavit or otherwise, sufficient to satisfy the Court that he is entitled to the relief sought. 13 A.W.N. 26.

¹ This section was newly added by Act VI of 1892.

6. When, by any special or local law⁽¹⁾ now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application,⁽²⁾ nothing herein contained shall affect or alter the period so prescribed.

(Old Acts).

[When, by any law not mentioned in the Schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of limitation differing from that prescribed by this Act is especially prescribed for any suits, appeals or applications, nothing herein contained shall affect such law.

S. 6, of Act IX of 1871.

And nothing herein contained shall affect the periods of limitation prescribed for appeals from, or applications to review, any decree, order or judgment of a High Court in the exercise of its original jurisdiction.

When, by any law now or hereafter to be in force, a shorter period of limitation than that prescribed by this Act is specially prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act.]

S. 3 of Act XIV of 1859.

1.—Applicability of Act to cases under special or local laws.*

(Notes)

Save as to the period of limitation, the other provisions of the General Limitation Act (*e.g.*, provisions of Ss. 5, 12 & 14) are applicable to proceedings and suits under special or local Acts. 5 C. 110=4 C.L.R. 371; 5 C. 313; 8 C. 910=10 C.L.R. 333; 10 C. 265; 8 B. 529; 10 M. 210; 12 M. 1; L.B.R. (1872-1892), 338; 23 A. 277.

Proceedings under the Civil Procedure Code:—

- (a) ——— not being proceedings under any special or local law, are governed by the General Limitation Law. 1 C. 226—3 I.A. 7=25 W.R. 285 (P.C.).
- (b) S. 7 of the Limitation Act held applicable to an execution application under S. 230 of the Civil Procedure Code. 16 B. 536.
- (c) The general rules of S. 5 of the Limitation Act were applied to an application for execution under S. 230, C.P. Code, on the broad principle that, where parties are prevented from doing a thing in Court on a day not on account of any act of theirs but by reason of the Court being closed, they are entitled to do it at the next possible opportunity. 18 C. 631; (See also 18 C. 231 on the same point).

(1) . Registration Act (III of 1877):—

- (a) The provisions of S. 5 of the Limitation Act apply to suits under S. 77 of the Registration Act. 8 C. 910=10 C.L.R. 333; 74 P.R. 1890.

But see 10 M. 249=7 M.L.J. 94 (noted *infra*).

1.—'Applicability of Act to cases under special or local laws.'—(continued).

- (b) The provisions of S. 7 of the Limitation Act are inapplicable to suits under S. 77 of the Registration Act, on the ground that the provisions of S. 7 of the Limitation Act are applicable only to those cases to which limitation is provided by the third column of the second schedule of that Act. 18 M. 99 (F.B.)
- (c) Nor do the provisions of S. 5 of the Limitation Act apply to such suits. 20 M. 249—7 M.L.J. 94.

(2) 11 & 12 Vic., Chap. 21, (Insolvency):—

The provisions of S. 5 of the Limitation Act as to the last day being a holiday are applicable to an appeal under the above statute. 14 M. 404.

(3) Act IX of 1859, S. 20:—

- (a) It is the above section of the above Act, and not the General Limitation Act, that was applicable to a suit by a Hindu reversioner to recover property alienated by a Hindu widow and forfeited from the alienee to the Government and granted by the latter to a stranger as reward for loyalty. 13 A. 108.
- (b) 1 I.A. 167 (P.C.)—21 W.R. 318 decided that the provisions of Act XIV of 1859, relating to the benefits of minority, could not be imported into Act IX of 1859, which was a special enactment.

(4) Suit for rent under Act X of 1859 (Bengal):—

A——is not governed by the general law of limitation but by the provisions of Act X of 1859 (Bengal), on the ground that Act X of 1859 is a complete code in itself. 19 W.R. 5=15 B.L.R. (P.C.) 60 (Note); 18 C. 368 (F.B.); 5 W.R. (Act X Rulings), 641.

(5) Act III of 1864 (Bengal Municipality):—

S. 87 of——is applicable only to those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise, or *bona fide* exercise, of their statutory powers. 6 C. 8 (F.B.)

As to notice to be issued under Bengal Act IV of 1876 (Municipal Consolidation) see 18 C. 91 (F.B.).

(6) Act VIII of 1880 (Bengal Rent):—

- (a) The provisions of S. 5. of the General Limitation Act as to a suit, the last day of limitation for which falls on a close holiday, do not apply to a suit under the above Act. 4 C. 50=2 C.L.R. 543.
- (b) But see 5 C. 314, 5 C. 906 and 7 C. 690, which decide that the provision of S. 5 of the Limitation Act do apply to suits under the above Act.
- (c) The period of limitation must, in the absence of a special agreement, be calculated from the last day of the year following the expiration of the year for which the rent is claimed. 5 C. 713=6 C.L.R. 49.
- (d) The provisions of S. 7 of this Act are not applicable to a suit for arrears of rent under the above Act accrued during the plaintiff's minority, on the ground that S. 7 applies only to those cases to which limitation is provided by column 3 of the second schedule of the Limitation Act. 17 C. 268.

1.—‘Applicability of Act to cases under special or local laws.’—(continued).**(7) Act VII of 1880 (Bengal):—**

The provisions of S. 14 of the Limitation Act were held applicable to proceedings under the above Act. 20 C. 264.

(8) Act VIII of 1885 (Bengal Tenancy):—

(a) Art. 3 of Sch. iii applies only to suits brought by an occupancy ryot against his landlord and not to suits against trespassers. 15 C. 317.

(b) But a suit against the landlord after dispossession is governed by the special provision of limitation contained in the abovementioned article 3. 16 C. 711; 17 C. 926.

(c) The deposit required to be made under the Act for the setting aside of a sale held thereunder may be made on the re-opening day, if the last day for such deposit happens to be a close holiday. 18 C. 231.

(N.B.) This case and 18 C. 631 have been decided on general principles and not with reference to S. 5 of the Limitation Act.

(9) Act XII of 1881 (N.W.P. Rent):—

(a) The provisions of section 5 of the general Limitation Act are applicable to rent-suits under the above Act (N.W.P. XII of 1881), on the ground that the latter Act is not a complete code in itself and also because S. 5 of the Limitation Act does not *affect or alter* the period prescribed for the suit by the N.W.P. Rent Act. 23 A. 277 (*dissenting from* 21 A. 22, *noted infra*).

(b) also to applications under the above Act. 13 A.W.N. 117.

(c) But 21 A. 22 holds that S. 5 of the Limitation Act is not applicable to a suit under S. 93 (h) of the above Act, on the ground that Act XII of 1881 specially prescribes periods of limitation.

(d) Ss. 93 (h) and 94 :—A suit by one collecting co-sharer against other collecting co-sharers, not being lambardars of the *mahal*, for profits collected by the latter (i. e.) defendants, over and above what was due to them, is governed by the special limitation in S. 94 of the above Act. 16 A. 28 (F.B.)

(e) Ss. 81 and 148 of the Act are applicable only to the particular class of suits mentioned therein and not to suits for declaration of right to, and possession of, the land in respect of which the rent accrued due. 10 A. 347 = 8 A.W.N. 62.

(f) S. 93 (h) :—A suit by a recorded co-sharer against the *lambardar* for recovery of his recorded share in the profits of the village is governed by the three years' rule. 12 A.W.N. 45.

(g) A suit for ejectment by a landlord against an occupancy tenant and the latter's mortgagee is governed by the general Limitation Act and not by the limitation provided in S. 94 of the above Act, since the mortgagee-defendant is a stranger. 14 A. 223.

1.—'Applicability of Act to cases under special or local laws.'—(continued).

(10) Act XV of 1873 (N.W.P. Municipalities):—

- (a) S. 43 of the above Act is applicable to suits brought against a Municipal Committee for something done under that Act, in which compensation was claimed, and not to those in which compensation was not claimed. To other cases, the general Limitation Act is applicable. 4 A. 102 = 2 A.W.N. 63; on appeal, 4 A. 393 (F.B.) = 1 A.W.N. 148.
- (b) S. 22 of the Limitation Act is applicable only to the case of a person personally made a party to a suit, and not to the case of a Municipal Committee sued in the name of their officer. 2 A. 296.

(11) Act XVIII of 1873 (N.W.P.):—

The provisions of S. 15 of Act IX of 1871 (S. 14 of the present Act) not applicable to suits under Act XVIII of 1873 (N.W.P.). 1 A. 254.

(12) Act VI of 1873 (Bombay District Municipalities):—

- (a) The provisions of S. 14 of the Limitation Act are applicable to a case under S. 86 of the above Act. 8 B. 529.
- (b) S. 86——is not applicable to suits in the nature of actions in ejectment, to which the general Limitation Act it is that is applicable. 6 B. 580: Compare 18 B. 19.
- (c) Section 86 is applicable to every claim of a pecuniary character arising out of the acts of a Municipal body or its officers, who may have committed illegalities not justified by their powers in the *bona fide* discharge of their duties. 8 B. 421.
- (d) In 7 B. 399, the point whether S. 86 of the Act applies to an action for money had and received was left open.

(13) Act XVII of 1879 (Dekhan Agriculturists' Relief):—

- (a) S. 72——Though the action against a principal debtor may be barred under the general Limitation Act, that against the surety—an agriculturist—would be saved by S. 72 of the above Act, which gives an extended period against all agriculturists. 5 B. 647.
- (b) But, when the agriculturist-surety is made a co-defendant in a suit on a money-bond, the ordinary law of limitation would apply, and not the period of 6 years allowed by S. 72 abovementioned. 9 B. 461.

(14) Burma Courts Act:—

- (a) The general provisions of S. 5 of the Limitation Act are applicable to an appeal, for which a special period is provided by the Burma Courts Act. L.B.R. (1872—1892), 338.
- (b) A second appeal under S. 27 of the Burma Courts Act was not subject to the limitation of time prescribed for appeal to a High Court under Act XV, 1877. 10 C. 946.

(15) Oudh Rent Act:—

The provisions of S. 5 of the Limitation Act are inapplicable to suits under the Oudh Rent Act. 4 O.C. 182.

1.—‘Applicability of Act to cases under special or local laws.’—(continued).**(16) Punjab Courts Act :—**

The provisions of S. 7 are not applicable so as to extend the period of thirty days prescribed in S. 40 (2) of the Punjab Courts Act in favor of a minor. 69 P.R. 1897.

(17) Act IV of 1873 (Punjab Municipality) :—

S. 19.—Where an act is not done by a Municipal Committee in the exercise of its statutory powers or in the belief that it had the power to do such act, the special period provided in S. 19 would not apply but the provisions of the general Limitation Act would apply. 10 P.R. 1877; 79 P.R. 1884.

(18) Act XXVIII of 1860 (Madras, Boundary) :—

(a) The provisions of S. 5 of Act IX of 1871 *held* inapplicable to a suit under the above Act. 3 M. 92.

(b) The provisions of S. 14 of the Limitation Act are applicable to a suit by way of appeal from a decision under S. 25 of the above Act. 12 M. 1.

(19) Act III of 1871 (Madras District Municipalities) :—

S. 168.—A suit by a contractor for price of timber supplied is governed by the general Limitation Act, and not by the special provision of limitation contained in the above Act. 2 M. 124.

(20) Act II of 1864 (Madras Revenue Recovery) :—

(a) S. 59.—A suit by a mortgagee's assignee for recovery of money due under the mortgage bond on the security of property sold in revenue auction for arrears of revenue, is governed by the special provision as to limitation contained in S. 59 of the above Act, and not by the general Limitation Act. 10 M. 62.

(b) *But see and compare*, 15 M. 219.

(c) The above section is applicable not only to sales that are illegal by contravening the provisions of the Act, but also to sales affected by irregularities. 17 M. 134.

(d) A suit to set aside a revenue-sale held under Madras Act II of 1864 (Revenue Recovery) on the ground of fraud, is governed by S. 59 of that Act and not by art. 95 of the general Limitation Act. In such a case the suit must be brought within 6 months of the discovery of the fraud. 12 M. 168 (F.B.); 3 M.L.J. 255 (*distinguishing* 9 M. 457); 17 M. 189 (193)=4 M.L.J. 80.

(21) Act VIII of 1865 (Madras Rent Recovery) :—

(a) The provisions of the Act are inapplicable to suits under the Rent Recovery Act. 8 M.L.J. 256.

(b) An appeal under S. 69 of the above Act is not governed by the provisions of the general Limitation Act. An appellant, under the former Act, will not be entitled to an exclusion of the time occupied in obtaining copies of the judgment appealed against. The ground of decision in this case is that S. 69 of the above Act does not require a copy of the judgment to be produced and that the Act is a complete code in itself. 20 M. 476. *But see* 2 M.L.J. 217.

1.—‘*Applicability of Act to cases under special or local laws.*’—(continued).

(c) The provisions of S. 14 of the Limitation Act have been held applicable to suits under S. 78 of the above Act. 12 M. 467.

(d) S. 51—A suit by a landlord to enforce acceptance of pattaas tendered by him or such other pattaas as the Court might consider proper and enforce execution of muchilikkas in accordance therewith, is not governed by the special provision as to limitation contained in the above section but by the general Limitation Act. 13 M. 361.

(22) Act V of 1882 (Madras).—

The provisions of S. 5 of this Act (Limitation) are applicable to an appeal under S. 10 of the Act. 10 M. 210.

(23) Act IV of 1884 (Madras District Municipalities):—

(a) S. 261. A suit by a contractor's assignee for the recovery of a sum of money deposited by the contractor is not governed by the special provision as to limitation contained in the above section of the Act but by the general Limitation Act. 16 M. 474.

(b) A suit brought by the owner of land against a Municipality for recovery thereof by demolition of a shed erected thereon by the latter is governed by the limitation provided in S. 261 of the Municipal Act (IV of 1884), the act complained of being one done under S. 92 of that Act. 1 M.L.J. 301.

(c) Cf. 3 M.L.J. 223, which holds that a suit for recovery of land is not covered by S. 261 of the said Act.

(24) Act V of 1884 (Local Boards):—

The special period prescribed in S. 156 of the above Act is applicable only to a suit for compensation or for damages, and not to a suit for a declaration of title to land and injunction, to which the general Limitation Act applies. 3 M.L.J. 12.

(25) Regulation IV of 1816:—

The limitation prescribed for suits in the schedules of this Act was applied to suits instituted, under Madras Regulation IV of 1816, in Village Munsiffs' Courts. 9 M. 118.

2.—‘*Application.*’

means civil, not criminal, application. 20 B. 543 (at p. 546).

7. If a person⁽¹⁾ entitled⁽²⁾ to institute a suit or make an application⁽³⁾ be, at the time from which the period of limitation is to be reckoned⁽⁴⁾, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period,^(5a) after the disability has ceased,⁽⁶⁾ as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed⁽⁷⁾.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply.

Nothing in this section applies to suits to enforce rights of pre-emption^(a), or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected^(b) thereby, the period within which any suit must be instituted or application made.

Illustrations.

- (a) The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.
- (b) A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority within which he may bring his suit.
- (c) A right to sue accrues to Z during his minority. After the accruer, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease.

- (d) A right to sue accrues to X during his minority. X dies before attaining majority, and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.
- (e) A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accruer A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under this section.
- (f) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accruer, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

(Old Acts)

[If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.]

When this disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

Nothing in this section shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which the suit must be brought.

Illustrations.

- (a) The right to sue for the hire of a boat accrues to A during his minority. He comes of age four years after the accrual of the right. He may institute his suit at any time within three years from the date of his coming of age.

Old Acts.—(Continued).

- (b) A, to whom a right to sue for a legacy has accrued during his minority, attains full age eleven years after such right accrued. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his majority, within which he may bring his suit.
- (c) A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accrual of the right, A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased, within which to institute his suit. No extension of time will be given him under this section.
- (d) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accrual of the right, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time.

If, at the time when the right to bring an action first accrues, the person

to whom the right accrues is under a legal disability, the

S. 11 of Act XIV of 1859. Computation of period of limitation in case of legal disability.

action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.]

(Notes)**General.****(1) Minority:—**

— is a privilege personal to the minor, of which no one can take advantage except the minor himself. 3 A. 408 (412).

(2) Rights of assignee of minor's interests:—

(a) The section extends only to a minor and his representatives after his death; but not to the assignee of a minor. 26 B. 790—4 Bom.L.R. 513.

(b) Where an assignee of all the rights and interests of a minor is *sui juris*, he cannot claim the exemption accorded to the minor under this section. 9 C. 668 (F.B.)—12 C.L.R. 269 (F.B.); 8 A.W.N. 183 15 B.L.R. 357—24 W.R. 181.

General.—(continued).

(3) **Defence of limitation :—**

A minor judgment-debtor may, on attaining majority, raise the objection that an application for execution put in against him during his minority had been barred by limitation. 6 C.W.N. 348.

(4) **Requisites for exemption :—**

For a plaintiff to claim exemption it is enough if he is affected by disability at the date, when the *new* period of limitation prescribed by S. 19 began to run, though time might have begun to run against him or his predecessor in title previous to an acknowledgment of liability by the debtor. 13 M. 135.

1.—‘a person.’

Scope of section :—

(a) The section applies to cases in which there is either one claimant entitled, as of right, to take proceedings and he is affected by a disability or in which *all* the claimants are affected by some disability or other. It does not apply to cases in which one of the joint claimants is a minor and there are adults who may protect his interests, (*e.g.*) by taking the permission under section 231, C. P. Code. 13 M. 236 (at p. 240); 16 M. 436 = 3 M.L.J. 216 (4 A. 512); 17 M. 189; 25 M. 431 (F.B.) = 12 M.L.J. 166; 18 M. 38.

(b) As to the combined operation of Ss. 7 and 8, See and *Compare* 25 M. 26 and 6 C.W.N. 348.

(c) But the other High Courts hold the opposite view. They hold that, if one of several claimants is a minor, such minor's claim will be saved from bar by limitation by this section and that it is not law that the section applies only to the case of a sole minor decree-holder affected by disability or to a case where there are several joint decree-holders and *all* of them are minors. 14 C. 50 (53); 28 C. 465 = 5 C.W.N. 767; 20 B. 383; 6 Bom. L.R. 647; 22 A. 199 (F.B.) = A.W.N. (1900), p. 8; A.W.N. (1904), 163 = 1 A.L.J. 407. See also 3 O.C. 316 (B) on the same point.

(d) **Minor, rights of, to execute whole decree :—**

If there are two decree-holders, one of whom is a minor, and if the major decree-holder's right to execute the decree is barred, the minor may, on attaining majority, apply for execution of the whole decree. 14 C. 50; A.W.N. (1904), 163 = 1 A.L.J. 407.

(e) **Application by minor after attaining majority :—**

A minor decree-holder may apply for execution within 3 years after attaining majority, though after lapse of more than 3 years from the last application by his guardian. He may apply for execution, not only on behalf of himself, but also on behalf of other minor decree-holders. 7 B. 179; 20 B. 383; 7 C. 137.

(f) **C.P. Code, S. 386—Right to apply :—**

One of the legal representatives of a deceased appellant may, if he is a minor and if the other adult representatives have not applied to be placed on the record in the place of the deceased, apply to be placed on the record through his guardian, even after expiry of 60 days from the death of the deceased. 10 B. 220.

2.—'Entitled to institute a suit &c.'

'Entitled':—

- (a) The word ——— means 'entitled' in his own right. An adult judgment-creditor, who can protect the interest of a minor co-judgment creditor by taking proceedings under S. 231, C.P.C., cannot be said to be a person "entitled" to make an application for execution on behalf of himself and the minor. 25 M. 431=12 M.L.J. 166 (F.B.). See also 25 M. 26 noted under S. 8 *infra*.
- (b) But see and compare 28 C. 465 and other cases noted under Note 1 (c & d *supra*).

3.—'To institute a suit or make an application.'

(1) Applicability of section to proceedings other than suits and applications:—

- (a) The section is inapplicable to appeals; it applies only to suits and applications. 16 A.W.N. 128; 12 A. 461 (F.B.).
- (b) nor to an application under art. 177 to admit an appeal to the Privy Council. 18 M. 484; Compare 15 M. 169.
- (c) *But 15 A. 14 (17) holds that S. 7 is applicable to such an application, because a period of limitation is provided therefor by the second schedule to the Act (art. 177).

(2) Application by minor representatives of deceased appellant:—

- (a) An application on behalf of the minor sons of a deceased appellant, praying that their names may be entered on the record in place of the deceased would be in time though presented more than 60 days after the appellant's death. 103 P.R. 1881.
- (b) Also a similar application by the guardian of a minor, though beyond 60 days from death of the deceased appellant. 91 P.R. 1885 (F.B.).
- (c) But see 17 A.W.N. 42, which decides that the section does not apply to such an application by a guardian of minor appellants to bring on to the record the representatives of a deceased respondent.

(3) Proceedings in execution:—

- (a) The section is applicable not only to applications for execution, but also to applications in the course of execution proceedings, for which limitation is provided in the second schedule—(e.g.) an application under art. 165 objecting to a dispossession in execution. 21 M. 494=8 M.L.J. 75.
- (b) An interim application by the guardian of a minor decree-holder will not prejudice the minor's right to execute a decree within three years of his attaining majority. 4 M. 119.
- (c) It is applicable to an application under S. 311, C.P. Code, to set aside a sale; a minor may, after attaining majority, apply to set aside a sale even if it is confirmed. 9 A. 411=7 A.W.N. 58.

(d) First application by an unauthorized person:—

Where the first application, under S. 311, C.P. Code, is rejected on the ground of want of authority in the person applying for the minor, a second application by the authorized guardian, beyond the period of limitation, will be in time, even though made after confirmation of sale. 9 A. 411=7 A.W.N. 58.

(4) Applications in pending suits:—

The section applies to applications in pending suits. 8 C.W.N. 24.

4.—‘At the time from which the period of limitation is to be reckoned &c.’

(1) Initial disability :—

This section applies only to cases of initial, not subsequent, disability. 6 Bom. L.R. 639. *

(2) Cause of action during ancestor's life :—

(a) A minor would be entitled to the benefit of this section, only if the cause of action arose during his minority. If the cause of action arose during the life-time of the ancestor from whom he derives his title, he cannot have the benefit of the section. 12 W.R. 1—3 B.L.R. Ap. 80; L.B.R. (1893-1900), 530.

(b) If the cause of action accrued during the father's life and if the sons claim from the father, the fact that, at the date of the accrual of the cause of action, the plaintiffs were minors cannot give them any benefit under this section. Time would have run against them during their minority. 5 W.R. 169; 2 M.H.C. 340.

(3) Disability after accrual of cause of action :—

If the disability arises after the accrual of the cause of action, the person under such disability will not be entitled to the benefit of the section: (e.g.) a legatee under a disability will not be entitled to the benefit of the section if the cause of action had accrued during the life of the testator. 20 W.R. 2.

(4) Right accrued before birth :—

A minor cannot, on coming of age, avail himself of the benefit of this section in respect of a right of suit which accrued before his birth. 23 W.R. 235—15 B.L.R. 9 (Note).

(5) Minor reversioners :—

(a) A reversioner, who is a minor at the date of the alienation or who is born subsequently during the life of the widow, is entitled to the benefit of the section. 14 M.L.J. 209.

(b) The cause of action for a minor reversioner to sue for possession by displacing an adoption made by a Hindu widow arises, not on the date of the adoption, but on the death of the widow. He is not, therefore, bound to bring his suit for possession within three years of his attaining majority, and S. 7 has no application to such a case. 7 W.R. 357.

(6) Operation of section—Execution-application :—

The section would operate to suspend limitation, if, at any of the several points of time at which the period of three years is to be reckoned, under art. 179, for an application for execution, the person entitled to apply is under a disability. 20 C. 714 (approving 9 C. 181); 23 C. 374.

(7) Time beginning to run :—

Where a decree-holder died some time after the date of decree, without having applied for the execution of the decree, his minor son cannot apply for execution after attaining majority, claiming exemption from limitation under this section, as the section is not applicable to such a case. 6 A.W.N. 49.

4.—*At the time from which the period of limitation is to be reckoned &c.*—(continued).

(8) "From which the period of limitation is to be reckoned":—

These words mean 'the period fixed by law,' and not the period fixed by any Court by its order in any suit. 31 P.R. 1884.

(9) Whether the benefit of the section to the person affected by disability is absolute:—

(a) The benefit of this section is not limited to the period when the disability has ceased, but applies also to the period during which the disability continues. So, during the period of the disability, the person affected by the disability may take proceedings by his guardian or next friend. 1 C. 226—25 W.R. 285—3 I.A. 7 (P.C.); 2 C.P.L.R. 184; 9 C.P.L.R. 9; 7 B. 179.

(b) The right of suit which accrues to a minor during his minority is not taken away by the fact that his guardian might have instituted the suit on his behalf during his minority. He may, in such cases, sue after he attains majority. 6 Bom. L.R. 765—8 C.W.N. 809 (P.C.); 7 C. 187—8 C.L.R. 306.

(c) Suit by guardian during ward's minority:—

A——is the suit of the minor and is governed by the law of limitation applicable to the minor. 17 W.R. 419; 6 W.R. 19; 7 W.R. 161; 14 W.R. 429; 4 B.H.C.A.C. 199.

(e) General principle:—

The——is that time does not run against a minor, and the fact that a guardian has been appointed for him does not alter the question. 16 B. 536 (following 7 B. 170 and 9 C. 181).

(c₂) Suit by minor through next friend beyond the prescribed period:—

Though a minor may bring a suit within three years from the date of majority, still there is nothing in law to prevent a minor suing through his next friend, before his attaining majority, and such suit would be maintainable even though brought at a time when, if brought by a major, it would be barred by limitation. 112 P.R. 1881.

(d) Execution application by guardian:—

(1) The disability of a minor does not cease because he, through his guardian, makes applications for the execution of the decree obtained during his minority, and it continues so long as the minority lasts, 9 C. 181—11 C.L.R. 84.

(2) This section applies not only when a minor makes an application himself after he has attained majority, but also when an application is made on his behalf during his minority. 3 C.W.N. 24.

(3) An interim application by the guardian of a minor will not prejudice the minor's right to execute a decree within three years from the date of the majority. 4 M. 119.

4.—‘At the time from which the period of limitation is to be reckoned &c.—(continued).

- (4) The mere fact that some applications for execution were made on behalf of certain minors during their minority will not render applications made by the minors after their attaining majority barred by limitation. 22 A. 199 (F.B.) (following 20 C. 714, 23 C. 374).
- (5) This section applies even in cases of a minor on whose behalf an application is put in by his guardian during his minority. 3 A.W.N. 63.
- (6) Where, of two joint decree-holders, one died leaving minor representatives and the other alone applied for execution, the date of such application will be counted as the starting point even as regards the execution-application put in, later on, by the minor's guardian on behalf of the minor. 3 A.W.N. 63.

Civil Procedure Code, S. 230:—

This section does not exempt a minor decree-holder from the enactment in S. 230, C.P. Code, 1882, limiting the period during which execution shall be granted, i.e., 12 years from the date of decree. 128 P.R. 1894.

5.—(a) ‘Within the same period &c.’

(b) —‘Nothing.....shall be deemed to extend for more than three years &c.’

(N.B.)—The section ought to be read with the proviso in the last para.

(1) Time for minor shorter or longer:—

- (a) The time for a minor to bring a suit is not shorter than that allowed for adults; on the other hand, a person who was a minor at the date of the accrual of the cause of action has, in addition, three years from the date of his attaining majority. 10 W.R. 44; W.R. (1864), 302.
- (b) This section is an additional or supplementary provision giving minors liberty to take a fresh start from the date of attaining majority. If the ordinary period fixed by law had run out during minority, the minor may, on attaining majority, take proceedings within the same time after attaining majority, provided that such time shall in no case exceed three years from the date of majority. If the whole of the ordinary period has not run out during minority, the minor may, on attaining majority, take proceedings during the unexpired portion of such period, if such period is longer than three years, without invoking the aid of this section. 3 W.R. 21 (22); 4 M.H.C. 54; 7 W.R. 3; 6 W.R. 20; 5 W.R. 204; 5 W.R. 219; 13 W.R. 63; 7 W.R. 4; 2 W.R. 305.
- (c) If, however, the unexpired portion of the ordinary period is less than three years, the minor will have full three years from the date of his majority. 3 W.R. 21 (22).

(N.B.)—The decisions noted under Notes a, b and c *supra* were all under S. 11 of Act XIV of 1859 corresponding to the present S. 7.

5.—'Within the same period &c.'—(continued).

- (d) But, now, the section ought to be read with each article of the second schedule. The time within which a minor, who has attained his majority, can sue, depends upon the period prescribed by the schedule for the particular suit. If it is more than three years, the suit may be brought within three years. If it is less than 3 years, the suit must be brought within that period and cannot be extended to more than such period :
(e.g.) in the case of a suit under article 12, the suit must be brought within one year. 17 M. 316 (323) = 4 M.L.J. 152.
- (2) **Maximum period :—**
- (a) The effect of the section taken with the proviso is that a person under disability may sue, after the cessation of the disability, within the same period as he would otherwise be allowed under the schedule; but in no case can the period be extended to anything beyond three years from the cessation of the disability. 24 M. 387. 5 C.W.N. 545 = 3 Bom. L.R. 303 (P.C.) ; 11 W.R. 532.
- (b) For instance of a suit held barred because brought more than three years from the cessation of disability, see 10 M. 272.
- (c) For instance of an application held barred because brought more than a month from the date of majority, see 11 B. 473.
- (3) **Suit to set aside alienation by guardian :—**
- (a) A suit to set aside an alienation made by a woman as the guardian of her minor son can be brought by such son within three years of his attaining majority. 4 C. 523 = 3 C.L.R. 391.
- (b) A suit by a Hindu, to recover possession of property sold during his minority by his father, is within time if brought within three years after attaining majority. 8 C. 517 = 70 C.L.R. 489.
- (4) **Suit in ejectment—Adverse possession commencing during plaintiff's minority :**
An ejectment suit brought by a person more than three years after his attaining majority cannot be sustained as against a defendant whose adverse possession had continued for more than 12 years during the minority of the plaintiff. 27 B. 515 = 5 Bom. L.R. 274.
- (5) **Case of a Hindu lunatic :—**
A lunatic cannot take advantage of this section and file a suit for the restoration of property (alienated by other members) to the joint family, a lunatic being disentitled to inheritance or partition under Hindu Law. 8 C. 919.

6.—'After the disability has ceased.'**Cessation of disability :—**

- As to when minority ceases, see S. 3 of the Indian Majority Act (IX of 1875) as amended by S. 52 of the Guardians and Wards Act (IX of 1890), printed at pp. 325 & 120 respectively of the "Lawyer's Companion" and the cases noted thereunder,

7.—‘As would otherwise.....annexed.’

The rules contained in Act XIV of 1859 as to disability were of general application and were not confined to the period of limitation provided by that Act. • 14 W.R. 340.

There is a difference of opinion (in consequence of the words, “prescribed therefor in the third column of the second schedule hereto annexed” in the present section, as well as in section 7 of Act IX of 1871) as to whether the section is applicable to proceedings under Special or Local Laws under which periods of limitation have been prescribed.

(1) **Scope of section :—**

This section applies, strictly speaking, only to cases dealt with by this Act itself. 16 B. 536.

(2) **Suits under the Registration Act :—**

The provisions of this section do not apply to suits instituted under section 77 of the Indian Registration Act, which is a special enactment complete in itself. 18 M. 99. (F.B.).

(3) **Suit under Bengal Act VIII of 1869 :—**

The section is not applicable to suits for arrears of rent under Bengal Act VIII of 1869, because no period is prescribed under the Limitation Act for such suits. 17 C. 263.

(4) **Suit under Act XXV of 1857 :—**

The section is inapplicable to a ———, S. 9, there being no exception in Act XXV of 1857 in favor of infants. 13 B.L.R. 445.

(5) **Suit under Act IX of 1859 :—**

The section is not applicable to a ———, S. 20, there being no saving clause in favor of minors in that Act. 13 B.L.R. 292.

(N.B.)—The cases quoted in Notes Nos. 3 & 4 *supra* were under the old Act. They are printed here because the wording of the section in the present Act is the same as that of the corresponding section in Act IX of 1871.

(6) **Scope of section—Punjab Courts Act, S. 40 :—**

A minor is not, by reason of S. 7, entitled to have extended the period of thirty days prescribed in S. 40 (2) of the Punjab Courts Act. 69 P.R. 1897.

(7) **C.P. Tenancy Act :—**

This section applies to suits under the C.P. Tenancy Act. (Vide S. 81 of the Act). 9 C.P.L.R. 1.

8.—‘To enforce rights of pre-emption.’

Old Law.—Formerly (i.e. before Act XV of 1877), S. 7 was applicable to suits for pre-emption. 7 W.R. 279; 1 A. 207. The present section has abrogated these decisions,

9.—'Successive disabilities.'

Where a person, whose right to sue is limited (say) to 12 years, labours under a disability such as is specified in Act IX of 1871, S. 7, and the disability continues up to his death which occurs within those 12 years, leaving some (say) 8 years to run, his representative in interest has only the remainder of the period of limitation (*i. e.*, 8 years in the case supposed) within which to bring his suit. The fact of the representative being himself a minor does not give him any more time, as he can sue through his guardian or next friend. 24 W.R. 7.

(N.B.)—The above decision was under Act IX of 1871; the law has now changed—*vide* Illustration d to S. 7.

8. When one of several joint creditors⁽¹⁾ or claimants⁽²⁾ is under any such disability, and when a discharge can be given without the concurrence of such person,⁽³⁾ time will run against them all: but, where no such discharge can be given,⁽⁴⁾ time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.

Disability of one joint-creditor.

Illustrations.

(a) A incurs a debt to a firm of which B, C and D are partners. B is insane, and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D.

(b) A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

(Old Acts)

S. 8 of Act IX of 1871. [.....; but, where no such discharge can be given, time will not run as against any of them until they all are free from disability.

Act XIV of 1859. No provision corresponding to section 8 of the present Act.]

(Notes)

1.—'Joint Creditors.'

(a) If one of several joint creditors is affected by a legal disability and if there are others, who could have given a valid discharge without the concurrence of the others, time will run against all. 25 M. 431 (436), (F.B.); 4 A. 512.

1.—'Joint Creditors.'—(continued).

(b) Joint judgment-creditors:—

Joint judgment-creditors are not joint creditors within the meaning of the section. The classes of persons contemplated by the section are joint-creditors or joint-claimants, one of whom is under some disability, while there are others who can give a valid discharge. 13 M. 236 (239); 25 M. 431 (441)=12 M.L.J. 166; 20 B. 383; 22 A. 199 (F.B.) at p. 301; 14 C. 50.

2.—'Joint Claimants.'

(a) When one of two sons of a usufructuary mortgagor sued to set aside a sale of the mortgaged premises in execution of a simple money-decree, having been a minor when the sale was held, and the other son having allowed the suit to be barred by time, *held* that the suit was barred by limitation on the ground that he was not entitled to the benefit of S. 8, the latter part of the section applying only to a case of *all* the joint claimants being under a legal disability, which was not the present case. 16 M. 436=3 M.L.J. 216.

(b) Fraud—Revenue-sale:—

Where there are more claimants than one entitled to set aside a revenue-sale on the ground of fraud, the fact of one of them being a minor cannot save a suit from limitation, if the adult claimant or claimants had knowledge of the fraud more than six months before suit. 17 M. 339 (12 M. 168 (F.B.) and 16 M. 436).

(c) Co-owners:—

Where there are adult co-owners competent to give a valid discharge for rent even on behalf of minors, time will run against all including minors. 60 P.R. 1893.

(d) Members of joint Hindu family:—

The section cannot avail to extend the period in favor of a minor member of a joint Hindu family, if there is an adult member capable of taking proceedings and giving a valid discharge. 2 A.W.N. 114; 58 P.R. 1882; 4 A. 512.

(e) Partners:—

The section cannot avail to extend period in favor of a minor partner, if there is a major partner capable of taking proceedings and giving a valid discharge. 4 A.W.N. 58.

3.—'When a discharge can be given &c.'

Applicability of section:—

(a) The section applies only to those cases where the act of the adult joint owner or decree-holder is *per se* a valid discharge. The fact that one of several joint decree-holders can, by adopting the procedure laid down in S. 231 of the Code of Civil Procedure, give a discharge as regards the *whole* decree, would not affect the question; for, in such a case, it is not the act of the party, but that of the Court, that is intended to operate as a valid discharge. 13 M. 236 (240); 20 B. 383; 22 A. 199 (F.B.).

3.—‘When a discharge can be given &c.’—(continued).

- (b) “The section does not appear to include execution-creditors. The persons contemplated by it are joint-creditors or joint-claimants, one of whom is under some disability, while there are others who can give a valid discharge.” 13 M. 236 (239); 22 A. 199 (F.B.), at p. 201.
- (c) See, further, cases noted under the heading, *Scope of section*, Notes (a) to (d), at p. 572, *supra*.
- (d) When one of two decree-holders was a major and could have given a valid discharge without the concurrence of the other, who is a minor, the application of the latter will be barred, if the major decree-holder had allowed it to be barred. 4 A.W.N. 58.
- (e) But see 3 A.W.N. 63, which holds that, when one of two decree-holders is a minor, the latter may apply for execution within three years of his attaining majority, and any application by his guardian on his behalf will also be in time, although more than three years might have elapsed from the date of the decree.

4.—‘Where no such discharge can be given, time will not run.’

(a) Applicability of Section :—

The last part of the section applies only to cases of *all* the joint decree-holders or claimants being under a legal disability, and not to a case where one of the decree-holders is a major and the other a minor. 14 C. 50.

(b) Co-heirs :—

Where, in the case of—(e.g. the heirs of a deceased Mahomedan), an adult co-heir cannot give a valid discharge without the concurrence of the rest, the disability of any one of such co-heirs will save the suit from limitation. 25 M. 26.

(c) Co-obligees—Tenants-in-common :—

In the case of co-obligees, the presumption, in the absence of anything to the contrary, is that they are tenants-in-common entitled to the debt in equal shares. Where one of them is a minor, limitation will affect only the majors as regards their shares, the minor not being affected by the section. 25 A. 155.

(d) Accrual of cause of action during minority :—

Suit brought by a person, within three years of his attaining majority, on a bond obtained by his guardian in his name alone during his minority, is in time, although he had a brother, who was capable of giving a valid discharge and who could have sued upon it within proper time. 10 B. 241.

Continuous running of time.

9. When once time has begun to run⁽¹⁾, no subsequent disability⁽²⁾ or inability to sue stops it :

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

(Old Acts)

S. 9, Act IX of 1871. [Same as the present section.]

S. 11, Act XIV of 1859. *The latter part of Section 11 (vide the whole section reproduced under S. 7 supra), commencing from the word "but," partially corresponded to the present section 9.]*

(Notes)

Scope of section.

Scope of section:—

The section is not applicable to applications, but only to suits. 100 P.R. 1889.

Object of section:—

The——— is that where legal disability has ceased and an opportunity to sue has accrued, no subsequent disability of such person or of any person claiming through him should be allowed to operate to extend the period. 10 W.R. 285.

1.—'When once time has begun to run.'

Cause of action arising during ancestor's life:—

- (a) A cause of action arising during father's life-time cannot be suspended owing to minor son's disability at death of the father. 58 P.R. 1882.
- (b) If the cause of action accrued during the father's life, the son, suing as his representative, cannot avail himself of the plea of minority. 2 M.H.C. 340.
- (c) Where plaintiff claims his right from an ancestor and cause of action had arisen during the life of the ancestor, who had not been affected by any disability, plaintiff cannot seek the benefit of S. 7. L.B.R. (1898—00), 530.

2.—'Subsequent disability.'

(1) Subsequent disability:—

- (a) This section applies to cases of subsequent disability; thus when the disability to sue or apply for execution arises after time has once begun to run, the bar by limitation cannot be saved by such disability. 6 Bom. L.R. 699 (*distinguishing* 20 C. 714).
- (b) When once limitation has begun to run, it cannot be suspended by any disability subsequently arising. 6 A.W.N. 49.
- (c) Where a cause of action for a suit in ejectment accrued 5 years before the death of the plaintiff's father, *held* the son's suit, brought more than twelve years from the date of dispossession, was barred by limitation, notwithstanding his minority at the death of the father. 12 W. R. 1 3 B.L.R. Ap. 80.

(2) Cause of action accrued before minor's birth:—

A minor, on coming to age, cannot avail himself of the benefits of S. 7 of the Act, in respect of a right of suit which accrued before his birth or adoption. 28 W.R. 295—15 B.L.R. 9 (Note).

General.

(1) Suits whose cause of action accrued under repealed enactments :—

- (a) In a suit, the time provided wherefor by Act XIV of 1859 had not run out when Act IX of 1871 came into force, it was held that the provisions of the latter Act were applicable although limitation had begun to run under the previous Act. 1 B. 305 (Note).
- (b) In the case of a pro-note payable on demand executed when Act XIV of 1859 was in force but not barred under that Act and sued on after Act IX of 1871 came into force, it was held that the provisions of the latter Act applied, although limitation had begun to run when the old Act was in force. 1 M. 301.
- (c) Suit on a bond payable on demand granted to plaintiffs' father, when Act XIV of 1859 was in force. The plaintiffs alleged that the money advanced was theirs and that their father was their *benamidar*. Plaintiffs claimed exemption from limitation on the ground of minority. Held, in the absence of proof that the defendant knew of the *benamiee* character of the transaction, that time having begun to run during the father's life, the sons could not claim exemption and that the suit was barred. 5 W.R. 169.

(2) Defendant's absence from British India :—

— even after the arising of the cause of action will suspend the period of limitation and will be excluded from computation. 4 A. 530=2 A.W. N. 127; 8 B. 561 (*dissenting* from 6 B. 103).

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose⁽¹⁾, or against his legal representatives or assigns⁽²⁾ (not being assigns for valuable consideration) for the purpose of following in his or their hands such property⁽³⁾ shall be barred by any length of time.

Suits against express trustees and their representatives.

(Old Acts)

[Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time.

S. 10 of Act IX of 1871.

* EXPLANATION.—A purchaser in good faith for value from a trustee is not his representative within the meaning of this section.

No suit against a trustee in his lifetime, and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time; but no suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be

S. 2 of Act XIV of 1859.

(Old Acts)—(Continued).

maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding section, to be computed from the decease of such trustee: provided that nothing herein contained shall prevent a co-trustee from enforcing against the estate of a deceased trustee, any claim for contribution, if he shall institute a suit for that purpose within six years after such right of contribution shall have arisen.]

(Notes)**General.****Scope of Section:—**

The section applies only to a suit for the recovery of trust property for the purposes of the trust, and not to a suit to vindicate personal claims (e.g.) management of trust property, there being no question as to the application of the trust fund for the purposes of the trust. 13 C.L.R. 39—6 A. 1—10 I.A. 90 (P.C.).

(N.B.)—This decision virtually overrules 12 C.L.R. 370.

The fact of a plaintiff being interested in endowed property will not, by itself, entitle him to the benefit of the section. 8 P.R. 1899.

'Suits falling within the section.'**Misappropriation by trustee:—**

- (a) A suit by a successor in the office of a trustee of a temple against a predecessor in office to recover trust-money misappropriated by the latter. 11 M. 274.
- (b) A suit by plaintiff for recovery of money alleged to have been entrusted to defendant by plaintiff's mother for the benefit of plaintiff and misappropriated by the defendant. 14 M. 61 (11 M. 274, 17 C. 620).
- (c) A suit by a successor in the office of a trustee against the assigns of his predecessor in office on the ground that the assignment was in violation of the trust, as also for recovery of the property. 18 M. 266 = 4 M.L.J. 223.

'Suits not falling within the section.'**Claim to vindicate personal right:—**

A suit by a trustee to vindicate his personal right to the possession of immoveable property against another person claiming such right in the same character, the section being applicable only to suits to recover property for and on behalf of the trusts, and not to personal claims to manage trusts. 6 A. 1 (P.C.) = 10 I.A. 90 = 18 C.L.R. 39; 7 M. 417; 10 M. 375 (477); 16 M. 456.

Suit by one trustee against his co-trustees:—

A suit, by one trustee against his co-trustees, to protect his own interests and not, except indirectly, the interests of the trusts; cannot be regarded as one brought by the *cestui que trust*. 20 M. 398.

I.—Vested in trust for any specific purpose.

(1) 'In trust for a specific purpose':—

- (a) The words—*are intended to apply to trusts created for some defined or particular purpose or object, as distinguished from trusts of a general nature, such as the law impresses on executors and others who hold recognized fiduciary positions. Per CLARTH, C.J., 4 C. 897 (923) = 4 C.L.R. 193 (following 4 C. 455).*
- (b) The words—*are used in a restrictive sense and limit the character and nature of the trust attaching to the property sought to be followed. The phrase is a compendious form of expression for trusts of the nature and character mentioned in arts. 133 and 134 of the Act. Per WHITE, J., 4 C. 897 (917).*
- (c) The executor of the will of a deceased Mahomedan, holding his landed estate in trust to pay the profits in certain defined shares to the heirs and their representatives, is a trustee, and cannot plead adverse possession against those parties. 17 W.R. 190.
- (d) An executor who, by the will of a Hindu, is made an express trustee for certain purposes, is, as to the undisposed of residue, a trustee within the meaning of this section. 2 B. 388: But see 4 C. 897 (noted *supra*).
- (N.B.)—This decision was under Act XIV of 1859, S. 2.
- (e) A disposition under a will authorizing the legatee to realize the rents and profits of a house, to deduct therefrom the outlays and expenses in respect thereof, and to spend the balance on a deity, constitutes a—
2 Bom.L.R. 418.
- (f) Where property is vested in executors under the will of a testator in trust to pay legacies, debts &c., and a portion of the residue to the widow of the testator, a suit by her for the administration of her share in the estate and for a declaration of the invalidity of certain leases granted by the executors as against herself, falls under this section. 30 C. 308 (*distq.* 5 C. 910).
- (g) Where an estate is given by will to trustees for religious and other purposes, some of which are invalid or fail, the heirs of the testator may be barred by limitation from recovering the undisposed of property, though they might still bring a suit against the trustees to compel them to properly administer the trusts which had not failed. 8 C. 788 = 11 C.L.R. 370.
- (h) The section is applicable only to express trustees or trustees for a specific purpose. Where, with regard to the residue of certain properties mentioned in a will, no trust was declared or no direction was given to the executors to distribute the same among the heirs at law, the section held not applicable to a suit against such executors. 14 B. 476.

(2) The words—*apply to a case, where property is vested in defendant for a specific purpose and there has been a breach of such trust. 3 Bom. L.R. 422.*

(3) Trustee of temple:—

A person, in whom properties belonging to a temple become vested, is a trustee for a specific purpose within the meaning of this section. 31 C. 314, (*folly.* 11 M. 274).

*1.—‘Vested in trust for any specific purpose.’—(continued).***(4) Scope of section—Express trustees:—**

The section applies to suits against express trustees; (i. e.) persons in whom property is expressly vested by the rightful owner for the discharge of a particular obligation. 4 A. 187 = 2 A.W.N. 3.

(5) Implied and constructive trusts:—

The section applies only to express trusts and excludes implied or constructive trusts. So, where a trust has been expressly created for some specific purpose or object and property becomes vested in a person upon such trust, a suit against such person to enforce the trust can be brought after any length of time. 4 C. 455 = 2 C.L.R. 112; 3 C.L.R. 315.

(6) Constructive trusts:—

The section applies also to constructive trusts, and no suit against a constructive trustee will be barred by any length of time. 2 A. 361.

(7) Resulting trusts:—

(a) The section would not apply to resulting trusts. It applies only to express trusts. 7 A. 25 [following 6 A. 1 (P.C.)].

(b) The section does not save a suit brought to set aside the trusts specified in a trust-deed and enforce resulting trusts not so specified. 20 B. 511.

(c) This section does not apply to a case where constructive trustees, who are not representatives of the original trustees, bring a suit to establish and administer a resulting trust not expressly declared. 4 M. 404.

(8) Charitable trusts:—

Where property is vested in a person partly for charitable purposes and partly for others and he is not entitled to use it for his own benefit, he is a trustee. 21 W.R. 415.

(9) Government:—

(a) The Government coming into possession of an estate under a claim of forfeiture and let into possession by the Court of Wards, who took charge of the estate on the death of the last holder, is not a trustee. 5 M. 91 (F.B.); on appeal 8 M. 525 = 12 I.A. 120 (P.C.).

See also 11 M. 309 (314) (F.B.).

(b) Nor is the Government taking possession of a Khoti village and not being in possession as a stake-holder a trustee. 24 B. 23 = 1 Bom. L.R. 472.

(c) The ——— is not a trustee in respect of surplus sale-proceeds vested in a Collector under S. 31 of Act XI of 1859 (Bengal). 18 C. 234; 20 C. 51 (F.B.); *contra*, PRIOR, J., in 20 C. 51 (F.B.).

(10) Suit for money kept in deposit:—

A ——— is not governed by this section. 1 A.L.J. 422.

(11) Money received by defendant for plaintiff's use:—

The section is not applicable to cases where the defendant or his ancestor has received money for plaintiff's use—(i.e.) to cases falling under art. 62 of the second schedule—because the money is not vested for any specific purpose. 6 M. 402.

1.—'Vested in trust for any specific purpose.'—(continued).**(12) Suit against a treasurer :—**

The section is inapplicable to a suit against a treasurer of a Native State for money misappropriated, the money in the treasury not being vested in trust for any specific purpose. 34 P.R. 1898.

(13) Money entrusted to be accounted for :—

Where plaintiff advanced money to defendant from time to time to be accounted for by the latter, it was held that the transaction was in the nature of a trust and that no limitation would apply to a suit to recover such moneys. 10 W.R. 174.

(14) Trust-deed to liquidate debts :—

A ——— executed by a debtor cannot, unless communicated to the creditors, create a trust in favour of the creditors, but will enure only for the benefit of the executant. None of the creditors can rank as a beneficiary under such a deed. 25 C. 642—2 C.W.N. 469.

(15) Property set apart for debts :—

Where particular property is given by a testator upon trust to pay a particular debt or debts, a trust within the meaning of this section would be created, but a charge of debts generally by him upon his property or any part of it, would not. 7 C. 772 (F.B.) = 9 C.L.R. 327.

(N.B.)—The above case (7 C. 772) (F.B.) affirmed by the P.C. on the ground that the will created a charge on the immoveable properties and as a suit to enforce such a charge it was not barred by limitation. 15 C. 66 (P.C.).

(16) Trustee and Custui qui trust :—

When property is placed in the hands of another by way of trust, no cause of action accrues to the owner until there has been a demand by him and a refusal by the trustee to give up the property. 3 B.L.R.A.C. 409.

(17) Trustee—Mahomedan son :—

From the mere circumstance of a Mahomedan son managing his late father's estate, to which his sisters are also entitled, it cannot be inferred that he is trustee for his sisters. To such a case this section is not applicable. 16 C. 161 (P.C.) = 15 I.A. 220.

(18) Mahomedan Husband :—

A ——— is not a trustee for his wife in respect of her dower. 2 B.L.R.A.C. 306.

(19) Directors of Companies &c. :—

The director of a joint Stock Company, though not a trustee in every sense of the term, stands in a fiduciary relation towards share-holders with respect to the funds of the Company placed in his charge. He can be sued for breach of trust. 9 B. 373 (394).

(20) Suit against such directors :—

A suit against the director of a joint stock Company, into whose hands no part of the moneys of the Company actually comes does not fall under this section. 9 B. 373 (399); 18 B. 119 (180).

1.—'Vested in trust for any specific purpose.'—(continued).

(21) **Trustee—Mortgagee after satisfaction of mortgage:—**

A usufructuary mortgagee, after satisfaction of the mortgage, cannot be considered to be a trustee for the mortgagor. 9 W.R. 187 (F.B.)—B.L.R. Sup. Vol. 901.

(22) **Trustee—Benamidar:—**

A *benamidar* is not a trustee for the real owner within the meaning of this section. 11 W.R. 72. (See definition of 'trustee' in S. 3 of the present Act).

(23) **Benamidar:—**

A ——— is not a trustee within the meaning of the section. 2 B.L.R.A.C. 284.

(N.B.)—It appears that, in pursuance of the above decisions, Nos 21 to 24 *supra*, the definition of trustee has been enacted in Acts IX of 1871 and XV of 1877 (*vide* S. 3).

(24) **Religious trust:—**

Where property is not dedicated to an idol but is purchased in its name by a private individual, it is not vested in the purchaser for the use of the idol; and a suit to set aside any alienation thereof will be governed by the ordinary law of limitation and not by this section. 20 W.R. 95 (P.C.)—15 B.L.R. 176 (Note) (P.C.).

(25) **Purchaser of property belonging to Idol:—**

The purchaser, for valuable consideration, of property from a person who bought the same in the name of an idol, is not a trustee, especially when there is no formal dedication to the idol. 2 B.L.R.A.C. 155.

(26) **Trust—Evidence—Wajib-ul-uruz:—**

A *Wajib-ul-uruz* or village administration-paper, which provides for the surrender to absent share-holders, on their return to the village, of lands formerly held by them does not necessarily constitute a valid trust in their favor, although it may be evidence of such a trust. 2 A. 493; 3 A. 458.

(27) **Village record-of-rights:—**

Nor is a statement in a ——— evidence of a trust; even if it should be, a suit by a person in whose favor such a statement is made will be barred by limitation as against a purchaser for value without notice of the trust. 2 A. 460.

(28) **Agreement not constituting trust:—**

A transaction whereby certain shares in a company are allotted to a third person on the understanding that the latter was to transfer the shares to the plaintiffs on their paying him a certain sum of money does not constitute a trust in favor of the plaintiff for any specific purpose. The transaction is an agreement of which the plaintiffs can enforce specific performance. 2 C. 323.

2.—'Legal representatives or assigns.'

(1) Purchasers from trustees:—

—cognizant, at the time of their purchase, of a subsisting trust affecting the property, are not entitled to the benefit of the law of limitation, because they would not be *bona fide* purchasers. A suit against such purchasers would fall within the section. 5 W.R. 120.

(2) Assignee of trustee:—

An auction-purchaser acquiring trust property for valuable consideration at a sale in execution of a decree is an assignee of the trustee within the meaning of this section. 15 C. 703.

(3) *Bona fide* purchasers:—

Even in cases where a trust can be established, claims against purchasers in good faith for value and without notice of the trust will be barred by limitation, if such purchasers had been in possession for more than twelve years. 2 A. 394.

(4) Purchaser without notice:—

Even where a trust is established, if the trust property is sold in execution of a decree obtained against a purchaser from the trustee, and such

- purchaser has purchased without any notice of the trust, limitation would apply. 5 A. 608.

(5) "In good faith":—

The words— in §. 10 of Act IX of 1871, do not necessarily involve absence of notice in the purchaser of an existing trust or equity, though the fact of there being such notice may be an important element in the question whether there were *bona fides*. 1 B. 269.

3.—'For the purpose of following in his or their hands such property.'

(1) For the purpose of &c:—

The expression, "for the purpose of following in his or their hands such property" meant "for the purpose of recovering the property for the trusts in question." 13 C.L.R. 39.

(2) Suit for accounts against trustees:—

A suit against trustees for charging certain property with the trusts declared by the author thereof in respect of that property and for an account, will not be barred by any lapse of time. 8 C. 766.

(3) Suit for trust-money for plaintiff's own use:—

A suit having for its object the recovery of trust money, not for the purposes of the trust but for the plaintiff's own use on the failure of the objects of a trust, is not governed by this section. 16 A. 256=14 A.W.N. 273 [following 6 A. 1=10 I.A. 290 (P.C.)].

(4) Suit for surplus proceeds of debutter land:—

A —as between co-shraddhats, after providing for the worship of the idol, is one to which the ordinary law of limitation would apply. 19 W.R. 85.

3.—‘For the purpose of following in his or their hands such property.’—(continued),

(5) Suit to re-attach endowment to its legitimate object :—

A suit, the object whereof is to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object falls under the section. 14 M. 1 (8).

(6) Suit for exclusive management :—

A suit, the object whereof is to establish plaintiff's exclusive right of management of a religious institution and to exclude the defendant from management, does not fall under this section. 14 M. 159.

(7) Suit against trustees named in will :—

A suit against trustees named in a will for carrying out certain charities and their assigns, for following the trust property in their hands and having it applied to the purposes of the trust, falls under this section. 18 B. 551.

(8) Suit by trustee against ex-trustees :—

(a) A suit by succeeding trustees against dismissed trustees for recovery of property belonging to the trust will not be barred by any length of time. 6 M. 54.

(b) A—*for recovery of property disaffirming the acts of the latter falls within the section.* 13 M. 402.

(c) A claim by plaintiff to recover possession for himself of the *uraima* right (right of management) of an endowment does not fall within the section. 7 M. 387.

(d) A suit for the protection of trust property by the appointment of a new trustee is a suit for the purpose of following trust property, and falls under this section. 12 C.L.R. 370.

(N.B.)—This case does not refer to 6 A. 1 (P.C.), which had not then been decided. Perhaps the decision would have been different, if 6 A. 1 (P.C.) had then been decided.

(9) Where property has gone out of the hands of trustees :—

Where property, which became vested in the defendants for specific purposes, is no longer in their hands owing to their misconduct and improper dealing with it, a suit to recover such property falls within this section, inasmuch as it could be traced to them. 8 B. 432.

(10) Two persons executing the same trust :—

Where there are two persons executing the same trust, such as the superintendent of a religious endowment and his subordinate, a suit by the former to recover from the latter, on his dismissal from office, of property belonging to the endowment will not be barred by any length of time. 11 W.R. 333.

(11) Adverse possession against trust :—

If a person in whom property is vested in trust has enjoyed it adversely to the trust for more than 30 years before Act IX of 1871, the right to recover the property as trust property would be barred, there being no provision similar to this section in the law of limitation prior to Act IX of 1871. 31 C. 814.

3.—‘For the purpose of following in his or their hands such property.’—(continued).

(12) Suit by beneficiaries:—

(a) A—against the executors under a will for the purpose of following property vested in the latter for any specific purpose and for an account, falls under this section. 7 C.W.N. 354 (following 8 C. 766 and *distq.* 5 C. 910).

(b) A suit brought by the grantees of certain property (granted for the maintenance of themselves and a mosque, against the superintendent of the mosque and some other persons, who had sued him for removal from office and had entered into a compromise with him) for the setting aside of the compromise on the ground of fraud, falls under art. 95 and not under this section. 5 A. 294—3 A.W.N. 40.

(13) Suit for account against executor:—

The section has no application to a suit against an executor or his representative merely for an account and not intended to follow the trust property on the ground of a breach of trust. 10 B. 242 (following 6 A. 1—10 I.A. 90 (P.G.), and 5 C. 910).

11. Suits instituted in British India on contracts entered into

Suits on foreign contracts.

in a foreign country are subject to the rules prescribed by this Act.

No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract and the parties were domiciled in such country during the period prescribed by such rule.

(Old Acts)

Ss. 11 & 12 of Act IX of 1871.—[Same as above.
Act XIV of 1859.—No corresponding provision.]

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

12. In computing the period of limitation prescribed for any

Exclusion of day on which right to sue accrues.

suit, appeal or application, the day from which such period is to be reckoned shall be excluded⁽¹⁾.

In computing the period of limitation prescribed for an appeal, an

Exclusion in case of appeals and certain applications.

application for leave to appeal as a pauper, and an application for review of judgment, the day on which the judgment complained of was pronounced

and the time requisite for obtaining a copy of the decree⁽²⁾, sentence or order appealed against or sought to be reviewed, shall be excluded.

Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award⁽³⁾ shall be excluded.

(Old Acts)

S. 13 of Act IX of 1871. [In computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, an application to the High Court for the admission of a special appeal, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Act XIV of 1859.—No corresponding provision.]

(Notes)

General.

(1) The periods mentioned in the schedule must be computed subject to the provisions of this section. 2 C. 386 (F.B.).

(2) An appellate Court cannot, after registering an appeal and serving notice of the appeal, dismiss the same at the hearing on the ground that it was not presented within the prescribed period. 8 W.R. 141 (F.B.).

(N.B.)—But compare the cases at p. 562, *supra*, under the heading “*Ex parte admission of appeal—Remedy.*”

(3) A application for review of judgment presented after the ninetieth day, though within time, regard being had to the provisions of this section, must bear full stamp under art. 4, Sch. I, of the Court-fees Act because that Act and the Limitation Act are not *in pari materia*. 7 C.P.L.R. 111.

(4) Application for leave to appeal in forma pauperis :—

The provisions of this section are not applicable to an application for leave to appeal as a pauper. 12 A. 79.

But see 33 P.R. 1895, which holds that, in such a case, the time occupied in obtaining copies of the judgment and decree sought to be appealed against ought to be excluded.

General.—(continued).**(5) Second appeal :—**

Time occupied in obtaining a copy of the decree of the Court of first instance cannot be excluded in computing the period of limitation for a second appeal, since no such copy need be produced along with the memorandum of second appeal. 4 M. 419 (F.B.).

(6) Letters Patent appeal :—

(a) The time requisite for obtaining a copy of the judgment appealed against cannot be deducted, such copy not being required to be presented along with the memorandum of appeal. 2 A. 192; 9 A. 115.

(b) Though a——— is put in more than 30 days from the date on which the oral judgment was delivered, the appellant may pray the appellate Court to excuse the delay, if he had come in within thirty days from the date on which the written judgment is delivered. 12 W.R. 458.

(7) Leave to appeal to Privy Council :—

(a) An application for——— does not fall under this section, since no copy of judgment need be produced as a preliminary to the presentation of the application. 15 A. 14 (19); 19 B. 301.

(b) The time occupied in getting copies can't be excluded for an application for———. 10 M. 373; Per STUART C. J., in 1 A. 644, but SPARKIE J., *contra*, *Ibid*.

(c) In computing the period of limitation prescribed for an application for a certificate admitting an application for——— the time occupied in obtaining copies of the decree and judgment sought to be appealed against cannot be excluded. 15 M. 169.

(8) Criminal Appeals :—

(a) In computing the period of limitation for a——— by a prisoner in jail, the time occupied in the forwarding of the prisoner's application for copy of judgment to the Court and that in the transmission of the copy to the prisoner must be excluded. 9 M. 258.

(b) In computing the time for a——— the days occupied by the preparation of a copy of the judgment appealed against ought to be deducted. 6 M.H.C. 349.

1.—'The day from which.....shall be excluded.'**(1) Date of order or decree :—**

In calculating the period of limitation for applications as well as for appeals, the day on which the order or decree appealed against was made should be excluded. 2 B. 678.

(2) Date of accrual of cause of action :—

The——— ought to be excluded. 10 M. 292; 19 W.R. 94; 4 M.H.C. 409; 12 B. 617.

(3) ⁴ Date for repayment—Bonds :—

(a) The day mentioned in a bond for repayment is to be excluded from computation, because the payment may be made till the last moment of such day. The right to sue, therefore, accrues, not on that day, but from that day. 4 M.H.C. 390; 24 W.R. 463.

1.—‘The day from which.....shall be excluded.’—(continued).

(b) When in a bond the 30th day of a native month in a certain year was fixed for payment (both parties being under a mistake as to the number of days the month consisted of), *held* that the cause of action commenced on the day on which it would have commenced if the month had thirty days. 6 C. 239.

(c) On the 18th April 1883 (corresponding with the 1st Bysack 1290) the plaintiff instituted a suit to recover money due on a simple unregistered bond, dated 8th Bysack 1286, and repayable on the 30th Cheyt 1286 (corresponding with the 11th April 1880). The 12th April 1883 (30th Cheyt 1290) was a holiday.

Held, that limitation began to run on the 12th April 1880, and that the suit was therefore barred.

(d) In a suit on a bond dated a certain date and payable within so many years, the cause of action arises on the day of the month corresponding with the day on which the bond was dated. 12 B. 617.

(4) **Pro-notes payable on demand:—**

The day on which the cause of action arises—(e.g.) in the case of a pro-note payable on demand, the day on which the note is executed—ought to be excluded. C B.L.R. 292; 8 B.L.R. 24=16 W.R. 1.

(5) **Exclusion of date of majority:—**

The day on which a minor attains his majority may be excluded under the provisions of this section, in cases in which S. 7 of the Act will apply. 10 C. 748.

2.—‘Time requisite for obtaining copy of the decree &c.’

(1) **Commencement and termination of time:—**

(a) The time requisite for obtaining a copy does not begin till an application for copy is put in. 12 A. 461.

(b) The time that can be excluded must be taken to commence when the party appealing has done something in order to obtain copy of the judgment or decree, and not when he obtains it. A party delaying to apply for a copy is not entitled to exclude the period of such delay. It is immaterial for the party whether the decree has been signed or not, because the date of the decree is the date of the judgment. 23 B. 442; 10 C. 652.

(c) The exclusion sanctioned by this section applies as long as the right to appeal subsists: Where the period of limitation prescribed for an appeal expires during close holidays, an application for obtaining copies of decree and judgment may be made on the re-opening day and the time occupied in the granting thereof will be excluded. 25 B. 586=8 Bom. L.R. 244 (following 19 A. 342); 25 B. 584=3 Bom. L.R. 148.

(d) What is the time requisite for obtaining copies of decree and judgment is a question of fact depending on the circumstances of each particular case. 6 P.R. 1894.

2.—*Time requisite for obtaining copy of the decree &c.*—(continued).

(e) The question when the time requisite for obtaining copy of decree or judgment begins must be determined by the practice of each Court. 12 C. L.R. 541.

(f) In a case, where judgment was delivered one day and copy of decree was granted the next day, application for copy being made on the date of the judgment and stamp furnished the next day, *held*, the date on which judgment was delivered could alone be computed among the days requisite for obtaining copy of the decree. 2 U.B.R. (92-96), 456 : See also L.B.R. (1872-1892), 425.

(N.B.)—In Burma, the rule seems to be that application for copies must be accompanied by the requisite stamps.

(2) *Negligence of party* :—

A delay caused by the negligence of the party in applying for copy or in paying the money required for a copy, cannot be excluded from computation. 12 A. 79 (F.B.) = 10 A.W.N. 25.

(3) *Neglect of officials granting copies* :—

Delay caused by ——— ought to be excluded in favor of the party. 10 A.W.N. 10 ; 12 A. 105.

(4) *Delay in sending copies by post* :—

The ——— cannot be considered to be time requisite for obtaining copies and cannot be excluded from calculation. 14 C.P.L.R. 40.

(5) *Delay in faircopying and signing judgment or decree* :—

(a) Time requisite for obtaining copies, (*i.e.*) the delay in the actual preparation and delivery of the copies by the Court, can alone be deducted. Delay in the fair-copying and signing of the judgment or decree cannot be deducted, unless before that date application for copy had been put in. 12 A. 461 (F.B.) (*dissenting from* 18 C. 104 (F.B.)) ; 12 A. 79 (F.B.) ; 1 O.C. 184.

(b) The date of a decree or order is the date on which judgment is pronounced, for purposes of this section. 28 B. 442.

(c) It is the date that the decree bears, and not that on which the same was actually prepared and signed, that ought to be taken into calculation. 1 O.W.N. 98.

(6) *Delivery of judgment and signing decree* :—

The time between ——— ought to be excluded in computing the time for presentation of an appeal, if on that account the appellant is unable to obtain a copy of the decree from which he wishes to appeal. 18 C. 104 (F.B.). But see No. 5, *supra*.

(7) *Interval between 'ready' date and 'delivery' date* :—

The interval between the date on which the copy is ready and the date on which the party chooses to take delivery cannot be excluded. 9 C.L.R. 298 ; 4 C.P.L.R. 188 (*virtually overruling* 4 C.P.L.R. 166).

2.—‘Time requisite for obtaining copy of the decree.’—(continued).

(8) Translation of Judgment :—

Time occupied in obtaining copy of a translation of the judgment appealed against cannot be deducted in computing the period prescribed for an appeal. 145 P.R. 1883.

(9) Ascertainment of folios :—

An appellant is not entitled to a deduction of the time requisite for ascertaining the number of folios required for the copy of the decree he has applied for. 12 C. 30 (33).

(10) Date of furnishing stamps :—

The day on which the stamps are supplied and the day on which the copies are granted must be excluded. W.R. (1864), 145.

(11) Time for obtaining copies of decree and judgment :—

(a) In computing the period of limitation for filing an appeal, where copies of the decree and the judgment are applied for on the same day, the longer of the two periods requisite for obtaining the copies should be credited to the applicant, and he is not entitled to add on to the longer of the two periods any time within the *termini* of the longer period. 15 A.W.N. 101.

(b) The time taken to obtain a copy of the decree and the time taken to obtain a copy of the judgment must both be excluded except where those two periods overlap each other; and where they do overlap, the time overlapped shall be excluded only once. 8 M.L.J. 148.

(c) An appellant is entitled to deduct the day on which judgment was pronounced and one day in obtaining the copy thereof. 5 A.W.N. 257.

(12) Intervention of vacation :—

(a) If the period prescribed for an appeal expires during the vacation and if the appellant had not obtained the requisite copies before the closing of the Court and applies for such copies on the re-opening date, whilst his right of appeal is still alive, he is entitled to the benefit of the time requisite for obtaining copies. 10 A. 342; 2 Bom. L.R. 221.

(b) When judgment is pronounced on the last day before the Christmas vacation and copy is applied for on the re-opening day, the vacation may be deducted as part of the time requisite for obtaining copy of the judgment. 27 M. 21.

(c). Though folios for copies are called for during vacation, if the same are not received when tendered by the party during the vacation, the time up to the re-opening will be deducted in favor of the appellant. 8 C.W.N. 141.

(13) Time occupied by another party :—

Under S. 12, an appellant is not entitled to a deduction of the time taken by another party in obtaining the copies. 12 M.L.J. 385.

2.—‘Time requisite for obtaining copy of the decree.’—(continued).**(14) Suit for pre-emption—When decree becomes final:—**

In a—, where a certain time, after the decree becomes *final*, is fixed for payment of the purchase-money and where it is necessary to find out when the decree became final, time occupied in the granting of copies of decree and judgment to the unsuccessful party cannot be excluded. 1 A.W.N. 165; 3 A.W.N. 4; 1 A. 293.

(15) Non-prosecution of application:—

A second application for copies explaining the delay in non-prosecution of the first application may be taken as a continuation of the first, for the purposes of computing the time for an appeal. 18 M. 374.

(16) Appeal by a minor:—

Limitation runs against a person for appeal, though he is a minor. 12 M.L.J. 385.

3.—‘Time requisite for obtaining copy of award.’**Copy of award:—**

In an application to set aside an award, the time requisite for obtaining copy of the award must be excluded. 12 M.L.J. 77.

Old Law:—

Under Act IX of 1871, a party appealing could not deduct the time requisite for obtaining copy of the judgment as a matter of right. 21 W.R. 309 = 15 B.L.R. 273 (Note); 24 W.R. 105 = 15 B.L.R. 272 (F.B.).

(N.B.)—The law has now changed (*vide* para 3 of the above section).

‘Applicability of section to proceedings under special or local laws.’**(1) Land Acquisition Act, 1894:—**

The section does not apply in computing the period of limitation for an application under S. 18 (1) of the—; the time requisite for obtaining a copy of the award cannot be deducted. 79 P.R. 1904.

(2) Act VIII of 1869 (Bengal Rent):—

S. 103—A party applying for a review under, would be entitled to the benefit of the rules contained in this section of the general Limitation Act, though, so far as the *period* of limitation is concerned, it remains unaffected by the general limitation Act. 5 C. 110 = 4 C.L.R. 371.

(3) Madras Act VIII of 1865:—

In an appeal under S. 69 of—, the time occupied in obtaining copy of the judgment of the Revenue court cannot be deducted, because no such copy need be filed. 20 M. 476; 8 M.H.C. 44.

But, see 2 M.L.J. 217, which holds that such time ought to be excluded.

(4) Act VI of 1882 (Indian Companies):—

The section is not applicable to a person appealing under S. 214 of Act VI of 1882 (Indian Companies). 18 A. 215 = 16 A.W.N. 39.

13. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India⁽¹⁾ shall be excluded.

Exclusion of time of defendant's absence from British India.

(Old Acts)

S. 14, Act IX of 1871. [In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded, unless service of a summons to appear and answer in the suit can, during such absence, be made under the Code of Civil Procedure, section 60.]

S. 13, Act XIV of 1859. *In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories in India shall be excluded from such computation, unless service of a summons to appear and answer in the suit can, during the absence of such defendant, be made in any mode prescribed by law.*

(Notes)

Scope of Section:—

- (a) This section is not applicable to an application to set aside a sale in execution nor to any proceedings in execution. 3 A. 185.
- (b) The section is inapplicable to the case of a plaintiff absent beyond the sea, in consequence of transportation. 10 W.R. 263; 1 B.L.R. (Short notes), XXV.
- (c) Nor to the voluntary absence abroad of the plaintiff after he attained his majority. 2 M.H.C. 113.

1.—'Absence of defendant from British India.'

(1) Absence of defendant:—

- (a) This section applies even where, to the knowledge of the plaintiffs, the defendants, partners of a firm, are, during the period of their absence, carrying on business in British India through an authorized agent. 25 C. 496—2 C.W.N. 269 (F.B.). This overrules 10 C. 440, which held that the section is inapplicable when a defendant, though residing out of British India, is represented by an agent in British India.
- (b) The words 'absent from British India' do not necessarily imply 'previous presence' in British India. A defendant, residing out of British India, but carrying on business or having a shop or a house of business in British India through an agent, comes within the section. 14 C. 457.
- (c) The words 'absent from British India' include also persons who never had been residents of British India. Unless it can be affirmed that a person is or has been "present," it must necessarily follow that he is or has been "absent." 72 P.R. 1891.

1.—'Absence of defendant from British India.'—(continued).

(d) Though a cause of action might have arisen, the period during which the defendant was absent from India would be deducted, in computing the period of limitation. S. 9 does not modify the provisions of this section. 4 A. 580=2 A.W.N. 127; 8 B. 561 (*dissenting from* 6 B. 108).

(e) It does not matter whether the absence was before or after the accrual of the cause of action, because S. 9 of the Act does not control this section. 5 C.P.L.R. 88.

(2) Absence of land and defendant from British India :—

The time, during which the defendant as well as the land forming the subject-matter of the suit were out of British India, should be excluded. The land was absent by "*avulsion*." 34 P.R. 1869.

(3) Defendant's having agent in British India :—

The defendant's having, in British India, an agent on whom the summons can be served, does not prevent the applicability of the section. 9 C.P. L.R. 72.

(4) Occasional visits :—

The———of defendant to British India do not render the section inapplicable. 26 P.R. 1897.

14. In computing the period of limitation prescribed for any suit⁽¹⁾, the time during which the plaintiff⁽²⁾ has been

Exclusion of time of proceeding *bona fide* in Court without jurisdiction.

prosecuting with due diligence⁽³⁾ another civil proceeding⁽⁴⁾, whether in a Court⁽⁵⁾ of first instance or in a Court of appeal, against the defendant⁽⁶⁾, shall be excluded⁽⁷⁾, where the proceeding is founded upon the same cause of action⁽⁸⁾, and is prosecuted in good faith⁽⁹⁾ in a Court which, from defect of jurisdiction⁽¹⁰⁾, or other cause of a like nature⁽¹¹⁾, is unable to entertain it.

In computing the period of limitation prescribed for a suit, proceedings in which have been stayed by order under

Like exclusion in case of order under Code of Civil Procedure, section 20.

the Code of Civil Procedure, section 20, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed to the Court in which the suit is re-instituted shall be excluded⁽¹²⁾.

In computing the period of limitation prescribed for any application, the time during which the applicant has been making another application for the same relief shall be

Like exclusion in case of application.

excluded, where the last-mentioned application is made in good faith to a Court which, from defect of jurisdiction or other cause of a like nature, is unable to grant it⁽¹³⁾.

Explanation 1.—In excluding the time during which a former suit or application was pending or being made, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted⁽¹⁾.

Explanation 2.—A plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section.

(Old Acts)

S. 15. Act IX of 1871. [In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another suit, whether in a Court of first instance or in a Court of appeal, against the same defendant or some person whom he represents, shall be excluded, where the last-mentioned suit is founded upon the same right to sue, and is instituted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to try it.

Explanation 1.—In excluding the time during which a former suit was pending, the day on which that suit was instituted, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2.—A plaintiff resisting an appeal presented on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of this section.

S. 14. Act XIV of 1859. *In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, bona fide and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation.]*

• (Notes)

'Suits under special or Local Acts.'

(NOTE).—There is an apparent conflict in the decisions bearing on the applicability of the provisions of the general Limitation Act to suits under Special or Local Acts; but they are reconcilable. The grounds of the several decisions may be briefly summarized thus :—

- (1) Where a special or local Act is a complete code in itself, the provisions of the general Limitation Act will not apply to a suit falling under it. (For examples, see 30 C. 532 = 7 C.W.N. 550; 18 C. 368 (F.B.); 18 M. 99 (F.B.).

'Suits under special or Local Acts.'—(continued).

(2) Where a special or local Act is not a complete code in itself, the mere fact of such Act containing a special *period* of limitation for a particular suit falling under it, will not prevent the applicability of the provisions of the general Limitation Act other than the *period* of limitation, such provisions being those regulating the *computation* of the period of limitation, &c.—*Vide* Ss. 5, 12 and 14. (5 C. 110; 5 C. 314; 30 C. 264; 12 M. 1; 12 M. 467).

(3) Persons affected by legal disabilities, such as minors, &c., cannot, in suits falling under a special or local Act, avail themselves of the benefits of S. 7 of the Limitation Act, regard being had to the special wording of that section, viz. " * * * * as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed." Persons affected by legal disability are not, therefore, allowed an extension of the period of limitation prescribed, *not* by the general Limitation Act, but by a special or local Act. 17 C. 263; 18 M. 99 (F.B.).

(N.B.)—The above is a summary of the decisions noted under this heading in this section, those noted under the heading "Applicability of section to suits under special or local Acts" (p. 548 *supra*) under S. 5; those noted under the heading "Applicability of Act to cases under special or local laws" under S. 6 (p. 563, *supra*) and those under the heading "As would otherwise annexed" under S. 7 (p. 578 *supra*).

(1) Registration Act (III of 1877):—

The provisions of this section do not apply to a suit under S. 77 of the ———, the ground of decision being that the Registration Act is a complete code in itself. 30 C. 532=7 C.W.N. 550; 18 M. 99 (F.B.).

(N.B.)—10 C. 265 is virtually overruled. See 30 C. 532 (at p. 535).

(2) Act X of 1859 (Bengal):—

This section is not applicable to suits for arrears of rent under ———, the ground of decision being that that Act is a complete code in itself. 18 C. 368 (F.B.) [following 15 B.L.R. 60 (note) (P.C.)=19 W.R. 5].

(3) Act VII of 1880 (Bengal):—

The plaintiff was allowed a deduction of the time during which he was *bona fide* seeking redress under the Act from the Revenue authorities, who had no jurisdiction to deal with questions raised by him subsequently in a civil suit. 20 C. 264.

(4) Act XXVIII of 1860 (Boundary Act, Madras):—

The time occupied by the prosecution of a suit, by way of appeal from an order under S. 25 of the Act, in a District Munsiff's Court, may be deducted under this section, when a second suit is brought in the District Court. 12 M. 1 (5 C. 110; 8 B. 529; and 10 M. 210).

(N.B.)—The ground of decision in this case was that, save as to the *period* of limitation provided by a special or local Act, the other provisions of the general Act of limitation are applicable to suits brought under a special or local Act.

'Suits under special or Local Acts.'—(continued).**(5) Act VIII of 1865 (Madras Rent Recovery):—**

This section is applicable to suits brought under——, the ground of decision being the same as in 12 M. 1 *supra*. 12 M. 467 (following 8 C. 910, 8 B. 529 and 10 M. 210).

(6) Act VI of 1873 (Bombay Municipality):—

S. 14 of the general Limitation Act is applicable to a suit under S. 86 of——, 8 B. 529 (following 5 C. 314, 8 C. 910 and 10 C. 265).

(7) Act XVIII of 1873 (North-West Provinces):—

The section is inapplicable to suits or applications under——, the ground of decision being that the above Act is a special enactment complete in itself. 1 A. 254 [following 15 B.L.R. 60 (note) = 19 W.R. 5].

Scope of section :—

The circumstances contemplated in this section will, ordinarily, constitute a sufficient cause in the sense of S. 5. 5 A. 591.

1.—'Sult.'

This section does not apply to appeals. 23 C. 325.

2.—'Plaintiff.'**(1) Previous suit by plaintiff :—**

For the section to apply, the previous suit ought to have been brought by the plaintiff in the second suit or some person through whom he claims. 1 W.R. 29.

(2) Previous suit by co-owner :—

A previous suit by a co-owner of village lands for a re-distribution according to the custom of *kurai edu* will save a second suit by another co-owner from limitation. 2 M.H.C. 1.

(3) Proceedings conducted by a third party :—

Plaintiff cannot claim the benefit of this section unless the former proceedings had been conducted by some person through whom he derives title to sue. 6 M.H.C. 122.

(4) Suit by wrong person—Subsequent suit by right person :—

Where a suit brought by a wrong person is dismissed, in a suit subsequently brought by the right person, the period occupied by the previous suit cannot be deducted. 7 C. 367.

(5) Suit brought by defendant :—

No deduction can be allowed to a plaintiff of the time occupied by a previous suit brought by defendant on the same cause of action, if it was not a suit in which the Court was unable to decide the question at issue in the second suit from defect of jurisdiction or other such cause. 9 W.R. 455.

3.—‘*Due diligence.*’

Pensions Act, S. 6:—

- Non-production of a certificate under S. 6 of the Pensions Act, does not constitute such a want of due diligence as to disentitle the plaintiff to deduction of time occupied by a previous suit. 8 B. 223.

(N.B.)—For other cases, see cases under the heading No. 9 “*Prosecuted in good faith,*” *infra*.

4.—‘*Another Civil proceeding.*’

(1) Time occupied by appeal or revision:—

In a suit to set aside an order of a Court, the period during which the plaintiff had been prosecuting an appeal or revision against the order should be excluded. 2 A.W.N. 59.

(2) Appeal in wrong Court:—

Time taken up in prosecuting an appeal in a wrong Court cannot be deducted. 28 B. 235.

(3) Claim to set-off:—

Time occupied by the adjudication of the plaintiff's claim to a set-off put forward in a previous suit in which he was defendant and in which such claim was ultimately disallowed, not on account of any want of diligence on his part, may be deducted in computing the period for a suit subsequently brought by the plaintiff for the amount sought to be set off in the previous suit. 4 O.C. 281.

(4) Disallowance of set-off on technical grounds:—

Where a *bona fide* claim to a set-off was disallowed on technical grounds, the period during which the suit was pending cannot be excluded in computing the period of limitation for a suit brought to enforce the claim. 13 C.L.B. 214.

(5) Mutation of names, Proceedings for:—

An application for mutation of names under the North-West Provinces Land Revenue Act, 1873, is not a ‘civil proceeding’, and the Commissioner and the Board of Revenue are not ‘Courts.’ A.W.N. (1904), p. 54.

5.—‘*Court.*’

(1) Conciliator:—

A——appointed under the Dekhan Agriculturists' Relief Act, is not a Court within the section. Time occupied by proceedings before him cannot be excluded, in computing time for proceedings in the regular Court. 6 B. 31.

(2) Board of Revenue:—

The——acting in a matter relating to mutation of names under the North West Provinces Land Revenue Act, 1873, and the Commissioner, are not ‘Courts’ within the meaning of this section. A.W.N. (1904), p. 54.

6.—‘*Against the defendant.*’(1) **Former suit not against same defendants :—**

The time during which a former suit, not against the same defendant as in the second suit, but only against one of them, cannot be deducted. 5 W. R. 281.

(2) **Plaintiff in the second suit being defendant in the first :—**

The section would apply, where the plaintiff in the second suit, being defendant in the first suit, put forward as defence, his claim in the second. 1 W. R. 310.

7.—‘*Shall be excluded.*’(1) **What time should be excluded :—**

(a) The whole time, including the time in appeal, or second appeal, in which it is finally determined that the Court in which the suit was first launched had no jurisdiction, ought to be deducted. 24 W.R. 407 (P.C.); 20 W.R. 380 (P.C.).

(b) Where a suit is dismissed in appeal on the ground of want of jurisdiction in the lower Court and a suit is then brought in the right Court, the period between the decree in the first suit and the institution of the appeal should be excluded. 6 N.W.P. 141.

(c) When the first suit was dismissed for want of jurisdiction and on appeal the dismissal is confirmed, the time between the institution of the first suit and the disposal of the appeal ought to be excluded. 6 W.R. 308.

(d) The time during which a suit was prosecuted in a wrong Court cannot be excluded. 5 N.W.P. 80.

(e) For purposes of this section a suit cannot be said to have been ‘commenced’ by the filing of a plaint in a Court which had not jurisdiction to hear it. 14 A.W.N. 159.

(2) **Return of plaint :—**

(a) Where a plaint is returned to be presented to the proper Court, the plaintiff would be entitled to a deduction only of the time from the institution of the suit in the first Court up to the order for the return of the plaint, and not to deduction of the time during which the plaintiff waits to get the plaint back. 24 W.R. 26.

(b) The period between the order for returning the plaint and the actual return thereof to the plaintiff ought to be excluded. 7 A.W.N. 302.

(c) Time between the institution of a suit and the disposal of an appeal against an order returning the suit for presentation thereof to the proper Court, can alone be deducted. 3 M.L.J. 190 (24 W.R. 26).

(d) Where a suit is instituted in a wrong Court, which directs the return of the plaint to be re-presented to the proper tribunal, the proceedings in the first Court continue, within the meaning of this section, until that Court is really prepared to deliver out the plaint. 7 M.L.J. 261.

7.—‘*Shall be excluded.*’—(continued).

- (e) A Court returning a plaint for want of jurisdiction and for presentation to another Court has no jurisdiction to extend the time for the re-presentation of the plaint beyond the period of limitation. If it does, and if the suit is re-presented after the period of limitation, it will be barred. 5 M.H.C. 407.

8.—‘*Same cause of action.*’

(1) *Same cause of action* :—

- (a) For the section to apply, the previous suit must have been founded on the same cause of action as the second, and the Court ought to have been unable to entertain the first suit for a cause similar to defect of jurisdiction. 8 A. 475.
- (b) First suit for land and mesne profits. Mesne profits disallowed on the ground that a separate suit should be brought therefor. *Held* that a second suit for mesne profits alone was based on the same cause of action as the first suit was based on, and that the time occupied by the first suit and appeal therefrom ought to be excluded. 9 W.R. 402 (F.B.).
- (c) The section would apply when the second suit and the first were substantially based on the same cause of action, though, owing to the erroneous form of the first suit, the Court could not adjudicate thereon. 3 W.R. 101.
- (d) The section would not apply where the cause of action on which the second suit is based is not the same as that on which the first suit was based, (*e.g.* when the obligation sued on in the first suit was several and that in the second, was joint). 7 M.H.C. 242.
- (e) So, also, where two suits, one against one branch of a family and another against another branch, were dismissed, and then a consolidated suit was brought against both branches, *held* the first sets of suits and the second suit were not based on the same cause of action and the time occupied by the first set of suits ought not to be deducted. 8 B.H.C. A.C. 228.

(2) *Different causes of action* :—

The section would not apply unless the cause of action sued on in the first suit is the same as that sued on in the second :—(*e.g.*) a claim for mortgage-money on the ground of the mortgagee's being deprived of the mortgage-security and a claim for the mortgage-money after it has naturally accrued due under the terms of the deed, are based on two different causes of action. 4 O.C. 293 (B.).

9.—‘*Prosecuted in good faith.*’

(1) *Bona fides and due diligence* :—

- (a) The time occupied by a previous suit, dismissed for want of jurisdiction, can be deducted only if the same had been prosecuted *bona fide* and with due diligence. 17 W.R. 518.
- (b) To entitle a plaintiff to the indulgence allowed by this section, the previous proceedings must not only have been prosecuted in good faith but also with due diligence. 23 A. 434.

• 9.—‘*Prosecuted in good faith.*’—(continued).

- (c) A party acting on an honest belief formed with due care and attention will be entitled to the indulgence. 13 M. 269.
- (d) The section provides for cases in which a plaintiff, in perfect good faith, but under mistake, has instituted proceedings in a Court, not having jurisdiction in the matter. 10 C. 265.
- (e) The indulgence cannot be allowed where a pretended mistake is made with a view to harass the opponent; nor to cases where the proceedings having been instituted is not prosecuted diligently. 6 C.P.L.R. 85.

(2) Want of due care and caution :—

- (a) Where a party presents his suit in a Court, which, on account of its pecuniary value, he must have known to be beyond the jurisdiction of a Court, and the plaint is returned for presentation to the proper Court, the time occupied by the abortive proceedings will not be deducted unless very satisfactory reasons are made out for the delay. 8 A.W.N. 168.
- (b) Presentation of an appeal in a wrong Court out of ignorance of law, the facts being fully apparent, is not prosecuting a proceeding in good faith. 10 A. 587.

(3) *Bona fide* mistake :—

Where the law gives no jurisdiction at all to a Court or officer in a certain matter, there can be no *bona fide* mistake as to its or his jurisdiction in relation to that matter. 23 B. 591 = 1 Bom. L.R. 33.

(4) Mistake of law :—

- (a) A ——— on the part of a plaintiff as to the proper *forum*, does not entitle him to ignore subsequent facts, materially affecting his cause of action or to treat the plaint as one presented on the day on which it was first presented to a Court which had no jurisdiction. 1 O.C. 272.
- (b) A *bona fide* ——— in filing a suit in a wrong Court is a cause similar to defect of jurisdiction. 19 A. 348 = 17 A.W.N. 86 (F.B.) (12 B. 820; 18 C. 266; 18 M. 269).

(5) Mistakes of law and fact :—

A *bona fide* mistake of law upon a doubtful point of jurisdiction or procedure as much entitles a person to the benefit of S. 14 as a *bona fide* mistake of fact. 3 C.W.N. 283 (F.B.).

(6) Ignorance of law :—

Time occupied by the institution and prosecution of a *bona fide* suit in a wrong Court, though such institution may have been due to ignorance of law or the ill-advice of a pleader, ought to be excluded. 20 B. 188.

(7) Pursuing erroneous remedy :—

The erroneous pursuing of a remedy not sanctioned by law cannot give a party a right to deduct the time occupied by the erroneous proceedings. W.R. (Gap. No.) 371.

9.—‘*Prosecuted in good faith.*’—(continued).

(8) Suit against a dead man:—

Time occupied by a suit brought and prosecuted *bona fide* and with due diligence against a man, who, it appeared, had died before the suit had been put in, can be deducted. 12 W.R. 45=3 B.L.R. (A.C.) 288.

(9) Proceedings against wrong persons:—

(a) When a suit instituted against wrong persons as heirs of a deceased debtor is dismissed and a second suit is brought against the right persons, the time occupied by the first suit cannot be excluded. 7 N.W.P. 284.

(b) Where a suit is brought within time against certain persons supposed to be, but not, the representatives of a deceased debtor, but the plaintiff, after the expiry of the period of limitation, sought to make the right persons parties, *held*, the suit against the latter was barred. 10 B.H. C.A.C. 224.

(c) Where the previous suit was against a wrong party, no deduction can be made. 1 W.R. 121.

10.—‘*Defect of jurisdiction.*’

(1) Jurisdiction:—

The term——implies, besides territorial or pecuniary jurisdiction, the presence or absence of positive power or authority conferred by law upon judicial tribunals in cases satisfying the above conditions. 8 A. 519.

(2) Scope of section:—

The section would apply only when a Court had no jurisdiction to entertain a former suit, but not where it had such jurisdiction. 25 W.R. 540.

(3) Defect of jurisdiction:—

——means defect of jurisdiction of the particular Court, wherein the previous suit was proceeding, *not* an inability to entertain the particular suit shared by that Court in common with other Courts. 45 P.R. 1898.

(4) Requisites for deduction:—

The——of time are:—(1) the previous suit ought to have been prosecuted in good faith; and (2) the Court in which it was prosecuted ought to have refused to entertain it for defect of jurisdiction or other cause of a like nature. L.B.R. (1872—1892), 500.

(5) Disposal on technical grounds:—

Disallowance of a claim to a set-off on technical grounds is not disposal thereof for want of jurisdiction or causes of a like nature. 18 C.L.R. 214.

(6) Dismissal of suit for want of a certificate:—

No deduction can be made of the time occupied by a previous suit dismissed for want of the certificate required by Mad. Reg. IV of 1831. 1 M.H.C. 320.

11.—'Other cause of a like nature'.

A.—What ARE causes similar to defect of jurisdiction?

(1) Misjoinder of causes of action and parties:—

(a) is a cause of a like nature with defect of jurisdiction. 22 M. 494; 22 A. 248 (F.B.); 9 M.L.J. 37; 10 C. 86=13 C.L.R. 218; 23 C. 821.

(b) Joinder of claims for moveable and immoveable property in the same suit and want of leave of the Court under S. 44, C.P. Code. 19 M. 90 and 20 M. 48 (F.B.).

(NOTE).—The above cases virtually overrule 17 M. 299, which held that misjoinder of causes of action and parties was *not* a cause similar to defect of jurisdiction.

(2) Misjoinder of co-plaintiffs:—

When a suit, in which a person not entitled was joined as co-plaintiff, was withdrawn, the time occupied by such suit was *held* liable to be excluded, when a second suit was brought. 14 M.L.J. 287.

(3) Failure to join all plaintiffs:—

First suit in a District Munsiff's Court, for a share of a certain amount due under a bond by three out of six persons jointly entitled to sue, withdrawn—Second suit instituted by all six for the whole amount in a District Court *held* saved by the section. 13 M. 451 (*following* 10 C. 86).

(4) Suit in wrong Court:—

Where a plaint in a suit instituted in a Court was returned for presentation to the proper Court and there was nothing to show want of *bona fides* in the plaintiff's instituting the suit in the wrong Court, the time during which the suit was on the file of the wrong Court must be excluded. 7 C. 284.

(5) Suit in wrong Court on defendant's representation:—

If the plaintiff, relying on the defendant's representation as to his place of residence, brings a suit in a wrong Court and the same is dismissed on the ground of defendant's non-residence within jurisdiction, he will, in a fresh suit, be allowed a deduction of the period during which the first suit was pending. 15 W.R. 69.

(6) Proceedings to enforce award:—

In computing the limitation prescribed for a suit upon an award, the time occupied in a previous ineffectual proceeding to enforce the same award summarily under S. 625 C.P.C. should be deducted. 59 P.R. 1894; also see 67 P.R. 1889, the principle of which decision is the same.

(7) Dismissal of regular suit to contest order on claim:—

A regular suit by a defeated claimant being dismissed as barred by S. 244, C.P. Code, he presented an appeal against the order dismissing his claim. *Held*, the time occupied by the prosecution of the regular suit may be deducted in computing limitation for the appeal. 12 B. 320.

11.—'Other cause of a like nature.'—(continued).**A.—What ARE causes similar to defect of jurisdiction?**—(continued).**(8) Misconception of plaintiff:—**

A——— as to the Court in which he ought to sue, coupled with the action of the Court, in which he instituted his suit on such misconception, in admitting the suit, *held* to be a cause similar to defect of jurisdiction under the special circumstances of the case. 3 B. 182.

(9) Suit for arrears of rent:—

(a) In a———, time occupied by a previous suit by the landlord against the tenant for ejectment of the latter as a trespasser will be deducted. 11 W.R. (P.C.) 5; 16 W.R. 79.

(b) A landlord suing a tenant for rent will be allowed a deduction of the time occupied by a previous suit by him against the tenant as a trespasser, only in cases he *bona fide* believed the tenant to be a trespasser, and not in cases where the former knowing him to be a tenant brings a suit treating him as a trespasser. 19 W.L. 18.

(10) Inability to effect service of summons:—

The section would apply to a case in which the first suit is dismissed in consequence of the plaintiff's inability to get the defendant served with summons and a second suit is brought against the representatives of the defendant in the first suit. 4 M.H.C. 1.

(11) Suit instituted with Registrar's sanction:—

The time occupied by a suit instituted in the P.S.C. Court with the sanction of the Registrar of the Court in respect of non-residents, but dismissed on the ground of want of power in the Registrar to grant such sanction may be deducted in computing the time for a second suit. 19 M. 90.

(12) Suit dismissed as cognizable by a S. C. Court:—

Time occupied by a suit prosecuted with due diligence but dismissed as being cognizable by the Court of Small Causes may be excluded when a fresh suit is brought. 16 M. 274.

(13) Accidental circumstances:—

The words 'other cause of a like nature,' include also accidental circumstances beyond the control of the plaintiff and causes not arising from the laches on the part of the plaintiff. 17 W.R. 266.

B.—What are NOT causes similar to defect of jurisdiction?**(1) Ignorance of law:—**

The words 'other cause of a like nature' do not release a person from the obligation to know the law of the land. 10 A. 587. Compare 12 A. 461 (F.B.) and 10 A. 524 noted under S. 5, Nos. 27 & 28 at p. 559, *supra*.

(2) Misjoinder of plaintiffs:—

is not a cause similar to defect of jurisdiction. 2 A. 622.

(NOTE).—This case is overruled by 22 A. 248 (F.B.), which is noted under heading A No. 1, *supra*.

11.—‘Other cause of a like nature.’—(continued).

B.—What are NOT causes similar to defect of jurisdiction?—(continued).

(3) Withdrawal of a suit or application :—

The causes for which withdrawal of a suit or application may be permitted are not causes “of a like nature” with defect of jurisdiction and hence S. 14 does not remove the bar created by S. 374, C.P.C. 6 B. 681 (following 6 W.R. 184) (F.B.) ; 12 B. 625 (10 B. 604).

(4) Abandonment of part of claim :—

A plaintiff, whose suit is dismissed for want of jurisdiction and who institutes the same suit based on the same cause of action in the same Court, having abandoned part of his claim, is not entitled to the benefit of this section. 5 M.L.J. 58.

(5) Neglect or laches of plaintiff :—

does not come within the section. The inability of the Court to entertain the suit must have arisen from an unavoidable circumstance over which nobody had any control or something incidental to the Court itself unconnected with the acts of parties. 34 P.R. 1898 ; 10 B. 604.

(6) Previous suit on unfounded title :—

Time occupied by a previous suit based upon an unfounded title cannot be deducted. 2 M.H.C. 266.

(7) Misconception :—

The time occupied by a suit dismissed on the ground of plaintiff’s misconception of his remedy cannot be excluded. 23 M. 621.

(8) Want of cause of action :—

The time occupied by a suit dismissed on the ground of absolute failure to establish any cause of action cannot be excluded. 23 M. 583 ; 19 P.R. 1888.

(9) Suit on foreign judgment which was a nullity :—

Time occupied by a suit on a Foreign judgment, which was a mere nullity cannot be excluded. 34 P.R. 1898.

(10) Non-suit :—

(a) The time during which a former suit, which was non-suited, was prosecuted, or the time during which an appeal against such decision was pending, cannot be deducted. 6 W.R. 184 (F.B.)—B.L.R. Sup. Vol. 553.

(b) No deduction can be made on account of the pendency of a suit wrongly non-suited on a point unconnected with jurisdiction. 7 W.R. 160.

(11) Non-joinder of parties :—

is not a cause similar to defect of jurisdiction. 12 A. 207—10 A.W.N. 76 (following 2 A. 632 and dissenting from 10 C. 86).

(12) Second suit instituted before disposal of the first :—

The fact that the second suit, in bar of which limitation is pleaded, is filed before the disposal of the first suit instituted in a wrong Court, is immaterial. 6 M.H.C. 45.

11.—'Other cause of a like nature.'—(continued).

B.—What are NOT causes similar to defect of jurisdiction?—(continued).

(13) Court's inability to entertain suit:—

The section does not provide for the deduction of time during which a suit, which the Court was not legally empowered to entertain was prosecuted. 63 P.R. 1886.

12.—'Para 2.'

Where proceedings in a suit have been stayed under S. 20, Civil Procedure Code, the plaintiff who re-institutes the suit in another Court is not entitled, under S. 14 paragraph 2, to the deduction of the time between the order staying proceedings and the return of the plaint. 24 W.R. 26; 3 M.L.J. 270.

13.—'Scope of para 3.'

(1) It is applicable also to execution-proceedings. 18 B. 734 (following 2 A. 792 = 7 I.A. 167 (P.C.).

(2) Application for execution:—

Where an ——— is *bona fide* made to a Court having no jurisdiction and proceedings conducted, the decree-holder will be entitled to a deduction of the time occupied by proceedings in such Court. 20 C. 29 (*distinguishing* 16 C. 744); 28 C. 238 = 5 C.W.N. 150 (following 2 A. 792 =

• 7 I.A. 167 (P.C.).

(3) Transfer of application:—

The time during which an application for execution had been transferred by mistake to another Court not having jurisdiction may be excluded in computing the period of limitation for an application for execution. 19 M. 67.

(4) Suit by a defeated claimant:—

In computing the period of limitation for an application for execution, the time occupied by a suit by a defeated claimant for a declaration that the property attached in execution was not liable to attachment (such suit being ultimately decided against such claimant) cannot be excluded. 154 P.R. 1890.

(5) Exclusion of time for another suit:—

(a) In computing the period of limitation prescribed for an application, the time during which a suit (not an application) had been prosecuted for the same relief could not be deducted under para 3 of this section. 3 A.W.N. 184.

(b) Where a decree-holder, instead of executing his decree, filed a fresh suit upon the same cause of action, which naturally failed, he cannot deduct the time occupied by the suit either under section 14 or 19, in an application to execute the original decree. 7 A.W.N. 198.

14.—'Explanation I.'

(1) A suit ends, for the purposes of this explanation, not on the day on which the High Court in second appeal remands it to the first appellate Court for disposal, but on the date the latter Court, after the enquiry directed by the High Court, finally disposes of it. 12 M. 484.

(2) The date of the dismissal of the appeal, and not the date on which the plaint is *actually* returned for presentation to the proper Court, is the date of the termination of the suit. 3 M.L.J. 190.

15. In computing the period of limitation prescribed for any suit, the institution of which has been stayed by

Exclusion of time during which commencement of suit is stayed by injunction or order.

injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was with-

drawn, shall be excluded.

(Old Acts)

S. 16, Act IX of 1871.

[In computing the period of limitation prescribed for any suit, the commencement of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded.]

Act XIV of 1859. No corresponding provision.

(Notes)

(1) Scope of section :—

- (a) The section is inapplicable to applications for execution; it is applicable only to suits. 11 M. 103.
- (b) The section only relates to injunctions staying "suits," and cannot be extended to applications. (See S. 3). 5 B. 29.

(2) Suspension of execution :—

A decree-holder would not be entitled to any exclusion of time during which execution was suspended by an injunction. 8 C. 218=10 C.L.R. 143.

(3) Order of attachment :—

An order of attachment of debt made under S. 268, C.P.C., does not amount to an injunction or order staying a suit under this section. So the ordinary period of limitation applies. 13 A. 76=10 A.W.N. 194.

(4) Attachment before judgment on injunction :—

- (a) An———obtained by a third party is not an injunction or order staying the institution of a suit on the bond by the obligee, within the meaning of this section. 13 A. 76; 14 A. 162.
- (b) An order under S 485 C. P. Code does not prohibit the institution of a suit within the meaning of this section. 17 A. 198 (P.C.)=22 I.A. 31.

(5) Application by third party :—

The fact that a third party has been prosecuting an application to get the deed on which a decree is based set aside will not prevent limitation running against the holder of such decree who has neglected to apply for execution thereof within the prescribed period. 11 A.W.N. 128.

(6) Striking off execution-proceedings :—

———from the file, is an act which may admit of different interpretations according to the circumstances of the case, and is not conclusive proof that such execution-proceedings were intended to be abandoned. 4 C. 877.

Notes—(Continued).

(7) Continuation of proceedings:—

Where a Court disposes of an application for execution after the judgment-debtor's property is sold and the sale-proceeds paid to the decree-holder but where it afterwards sets aside the sale and directs the decree-holder, to refund the sale-proceeds, and the decree-holder, thereupon, applies again for execution, the latter application will be considered to be one in continuation of execution-proceedings already set on foot and will not be affected by the Law of limitation. 4 C. 415 (following 23 W.R. 183).

(8) Interdiction against collection of debts:—

An order of Court interdicting a party from collecting debts is an interdiction against collection by suit or otherwise. A party so interdicted will be protected by the section, notwithstanding the fact that the order permits the party so interdicted to apply to the Court for special permission in cases of debts likely to be barred by limitation. 8 M. 229.

16. In computing the period of limitation prescribed for a suit,

Exclusion of time during which judgment-debtor is attempting to set aside execution-sale.

for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a proceeding to set aside the sale shall be excluded.

(Old Acts)

S. 17, Act IX of 1871. [Same as above.

Act XIV of 1859. *No corresponding provision.*]

17. When a person, who would, if he were living, have a right to institute a suit or make an application, dies before

Effect of death before right to sue accrues.

the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

When a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

Nothing in the former part of this section applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

(Old Acts)

S. 18 of Act LX of 1871.—[Same as the present section.

Act XIV of 1859.—No corresponding provision]

(Notes)**(1) Issue of administration :—**

In a suit by the Administrator-General on behalf of the infant heir of a deceased partner of a firm for recovery of assets recovered by the surviving partner after the demise of the deceased, *held* limitation began to run from the issue of administration. 23 B. 544 (P.O.) *affirming* 20 B. 15.

(2) Suit for account against manager's representatives :—

In a suit, for an account accruing to an employer on the death of his manager, limitation will not commence to run until administration has been taken out to such manager's estate. 7 C. 627.

(3) Executor de son tort :—

One———can not sue another executor of his own wrong or enforce his claim against the estate, without taking out letters of administration. Even where limited letters of administration are granted in respect of the estate of a person not falling within the Indian Succession Act, the whole estate remains unrepresented and no suit can be brought against it. 18 B. 337.

(4) Representative—person in possession of estate :—

A person in possession of the estate of a deceased Hindu is his legal representative for certain purposes, until some other claimant (*e.g.*, an executor under a will) comes forward. 4 C. 342.

(5) Appeal against order adding a legal representative :—

Where an application is made to a Court to place the legal representative of a deceased judgment-debtor on record for purposes of execution and the Court, on enquiry, decides who such legal representative is, its order will not be appealable to the High Court; but where no such enquiry is made, the High Court may interfere and set aside the order. 2 C. L.R. 278.

(6) Letters of administration—Hindus :—

If Hindus take out letters of administration at all, they must take out general letters. They cannot take out letters limited to some of the properties. 5 C. 2.

18. When any person, having a right to institute a suit⁽¹⁾ or make an application⁽²⁾ has, by means of fraud⁽³⁾, been kept from the knowledge of such right or of the title on which it is founded,

and where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application—

(a) against the person guilty of the fraud or accessory thereto,⁽⁴⁾ or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known⁽⁵⁾ to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

(Old Acts)

S. 19 of Act IX [Same as the above section with the exception that the of 1871 and S. 9 of words "or make an application" in the present section Act XIV of 1859. were not to be found there.]

(Notes)

Scope of section :—

- (1) The provisions of this section do not apply to criminal cases, and the limitation prescribed in S. 11 of the Indian Salt Act (XII of 1882), is not affected thereby. 20 B. 543.

1.—'Entitled to institute a suit.'

(1) Suits for pre-emption :—

(a) In suits for pre-emption, where exemption from limitation is sought for on the ground of fraud, it is necessary to prove that the fraud was committed within one year of the registration of the deed of sale and the fraudulent representation, if any, was made in order that the pre-emptor might be kept from the knowledge of his right of action, and that the latter was kept from such knowledge by the representation. 3 P.R. 1882.

(b) Omission to give notice to pre-emptors does not amount to keeping them from a knowledge of their rights by fraud so as to make this section applicable. 120 P.R. 1883; (29 P.R. 1878; 46 P.R. 1879 followed).

(c) Failure on the part of a vendee to issue the necessary notice, intending to keep the pre-emptor from a knowledge of his right will entitle the pre-emptor to sue, when he knew the fraud, if the vendee has abetted the fraud or claims otherwise than in good faith. 1 O.C. 202.

(d) Mere silence on the part of the vendor and vendee is not a fraud; there must be some distinct act done with the intention of deceiving the pre-emptor or concealing the fact of the sale from him. 73 P.R. 1885.

(e) Registration of a deed of sale at a place different from the one where the property is situate, and failure on the part of the vendee to take physical possession, such physical possession not being possible, do not amount to a fraudulent concealment so as to give an extended period of limitation in a suit for pre-emption. 16 P.R. 1902.

1.—'Entitled to institute a suit.'—(continued).

- (f) Where, in a suit for pre-emption, the plaintiff claimed exemption from limitation under this section on the ground that another person, in collusion with the vendee, brought a suit to enforce his right but, subsequently, after the lapse of one year, withdrew the same, *held* the plaintiff had to show that the other suit was collusive and fraudulent. 2 A.W.N. 7.
- (2) **Suit to set aside revenue-sale:—**
- (a) Where fraud is made the basis of the claim in a suit for setting aside a sale under Madras Act II of 1864, the suit ought to be brought within six months from the date of knowledge of the fraud. 12 M. 166 (F.B.)
- (b) If the plaintiff alleges that, being in possession of premises, he was ousted therefrom under a fictitious revenue-sale, so contrived as to make him believe that he had no right of action at all, he will be entitled to rely on the fraud for an exemption from limitation. 21 W.R. 109.

2.—'Make an application.'

(1) **Application under S. 311, C.P.Code:—**

- (a) An ———, on the ground of fraud, may be made within the same time after the knowledge of the fraud within which an ordinary application may be made under S. 311 C.P.C., if the application raises a question (between the parties to the suit) falling under S. 244 C.P. Code. Such an application may be made even after confirmation of sale. 17 C. 769 (F.B.) (*dissenting* from 14 C. 679).

Cf. 14 C. 679, which holds that the aid of this section cannot be invoked by an applicant under S. 311, C.P. Code, after the confirmation of sale.

- (b) Unless a judgment-debtor applying under S. 311, C.P.C., after the period prescribed by art. 166, can show that his case comes within S. 18, he will be barred. 1 C.W.N. 67.

- (c) An ———, if regarded as one falling under S. 244, will be governed by art. 178. 3 C.W.N. 333.

but if fraud were the ground alleged for setting aside the sale and if it is regarded as an application under S. 311, it will be governed by this section and art. 166. *Ibid.*

- (d) An applicant, whose right to apply under S. 311 had been concealed by fraud, may take the same proceedings within 30 days after discovery of the fraud, notwithstanding the confirmation of the sale. 7 C.W. N. 305.

(2) **Application by a Collector to set aside sale of a *bhag*:—**

An application by a Collector to set aside the sale of an unrecognized portion of a *bhag*, under Bombay Act V of 1862, may be brought within three years from the date the sale comes to his knowledge. 7 B. 543: *Cf.* 7 B. 546, which holds that no law of limitation applies to such proceedings.

3.—'Fraud.'

A.—General.

(1) Definition and nature:—

Fraud means active deceit in defrauding or endeavouring to defraud a person of his rights by artful device. To be available as a defence against limitation, the fraudulent act must have occurred while the plaintiff had still the right to sue. 4 P.L.R. 1908=86 P.R. 1902.

(2) Misapprehension or neglect of duty:—

The Court's action in sanctioning a compromise on a serious misapprehension of material facts caused by the actual fraud of executors (parties to a suit) under a will or by the culpable neglect of duty on the part of the executors sufficient to amount to fraud in the view of a Court of Equity will be fraud under this section. 8 C.L.R. 169.

(3) Concealed fraud:—

(a) The kind of fraud which would save a suit from limitation and which is provided for by this section is 'concealed fraud.' A mere allegation of collusion between defendant and some others in obtaining possession is not enough. W.R. (1864), 304.

(b) Unless, in a suit by one heir against his co-heir, for the former's share of money received by the latter from a third person with whom it had been deposited by the person from whom both the heirs claimed, it is shown that there was a fraudulent concealment, art. 62 would govern. 3 A. 170.

(c) A suit against an agent to recover money received by him and concealed from the knowledge of plaintiff is governed by this section. 21 W.R. 245.

(d) The realization by a decree-holder of the amount due under the decree, after a sale by him thereof to a third person, is a fraud; and a suit by the assignee of the decree will be saved from limitation by such fraud. 1 B.L.R.A.C. 76.

(e) Though each of a certain number of facts, when taken alone, might be merely suspicious, yet when found to concur, they would establish fraudulent concealment within the meaning of the section. 12 P.R. 1898.

(4) Fraud as an answer to limitation:—

Where fraud is pleaded by a plaintiff in answer to limitation, it must amount to concealment of his cause of action and the fraud alleged must be an ingredient in his cause of action. Otherwise, he cannot get over limitation. 9 W.R. 255.

(5) Ignorance of plaintiff:—

(a) The ——— in regard to the accrual of his right to sue will not prevent time from running against his suit unless it had been brought about by the fraud of the defendant. 8 W.R. 23.

(b) Ignorance of the accrual of the cause of action, from any cause other than the fraud of the defendant, will not save a suit from limitation. 19 W.R. 269.

3.—‘Fraud.’—(continued).**A.—General.—(continued)****(6) Dishonesty :—**

— in obtaining possession will not prevent the possessor from availing himself of the law of limitation, which, however, cannot relieve him from the charge of dishonesty. 5 W.R. 283.

B.—Pleading and proof.**(1) Charge of fraud —pleading :—**

- (a) A plaint charging fraud must set forth particulars; general allegations, however strong, not even amounting to an averment of fraud of which a Court can take notice, are not sufficient. A plaint defective in this respect ought to be returned for amendment or rejected. The Court ought not to dismiss the suit. 15 C. 593 15 I.A. 119 (P.C.).
- (b) The allegation must be specific in particulars and detail, and the finding of the Court ought to be precise as to the particular acts and intentions constituting the fraud. 3 P.R. 1882; 86 P.R. 1902 4 P.L.R. 1903.
- (c) The charge of fraud must be proved as laid in the plaint. If one kind of fraud is alleged in the plaint, the plaintiff cannot, on failure to prove the particular fraud, be allowed to substitute another kind of fraud for it. 11 B. 620 14 I.A. 111 (P.C.).
- (d) It must be proved by the person alleging it. The Court ought not to presume it from the mere existence of suspicious circumstances. 27 P.L.R. 1903.

Nature of fraud :—

- (e) The section will not apply where the specific acts relied upon in the plaint as constituting the fraud are not substantiated. 91 P.R. 1893.
- (f) The plaintiff ought to show that there was an industrious and artful concealment of facts leading to the inference that there was a design to keep the salient facts from his knowledge. 32 P.R. 1881.

(2) Burden of proof :—

- (a) It is for the defendant, who sets up limitation, to prove that the plaintiff had had clear and definite knowledge of the facts constituting the particular fraud for more than the period prescribed for the suit. Mere proof that plaintiff has had some hints and clues is not enough. 14 B. 408, 412; on appeal 17 B. 331 (P.C.) 20 I.A. 1.
- (b) When fraud is set up as a shield against limitation by the plaintiff, it is for the defendant to prove that plaintiff had a clear and definite knowledge of the fraud for more than the period of limitation allowed, or that the want of knowledge alleged by plaintiff was not caused by fraud. 34 P.R. 1904.
- (c) When once the fraudulent concealment is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. 12 P.R. 1898,

4.—‘Against the person guilty of the fraud or accessory thereto.’**Scope of section :—**

The section is applicable only to cases where the fraud is committed by the party against whom a right is sought to be enforced. 2 C. 1=25 W. R. 425.

5.—‘When the fraud.....became known.’**Nature of knowledge :—**

- (a) Mere suspicion is not enough. It must be such a knowledge as will enable the person defrauded to seek his remedy in Court; and the fraud must have been fully known to the plaintiff, so that limitation might begin to run against him. 14 B. 408. [*N.R.*—See same case noted under the heading **Burden of proof**, (a) *supra.*]
- (b) For a plaintiff to claim the benefit of this section on the ground of a document having been concealed from his knowledge, he must show that there was a fraudulent concealment and that he was, on account of such fraudulent concealment, unaware of its existence. 7 M.H.C. 22.

19. If, before the expiration of the period prescribed for a suit⁽¹⁾ or application in respect of any property or right⁽²⁾, an acknowledgment in writing, • acknowledgment of liability in respect of such property or right⁽³⁾ has been made in writing⁽⁴⁾ signed⁽⁵⁾ by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence⁽⁶⁾ may be given of the time when it was signed, but oral evidence of its contents shall not be received.

Explanation 1.—For the purpose of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right⁽³⁾.

Explanation 2.—In this section “signed” means signed either personally or by an agent duly authorized in this behalf⁽⁷⁾.

(Old Acts)

S. 20, Act IX
of 1871.

[(a) No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent generally or specially authorized in this behalf.

(b) When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

(c) When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section, a promise or acknowledgment may be sufficient, though it omits to specify the exact amount of the debt or legacy, or avers that the time for payment or delivery has not yet come, or is accompanied by a refusal to pay or deliver, or is coupled with a claim to a set-off, or is addressed to any person other than the creditor or legatee; but it must amount to an express undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.

Explanation 2.—Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.

Illustrations.

Z, a bond-debtor, himself writes a letter promising to pay the debt to his creditor A. Z affixes his seal, but does not sign the letter:

Z pays part of the debt and promises orally to pay the rest:

Z publishes an advertisement, requesting his creditors to bring in their claims for examination:

In none of these cases is the debt taken out of the operation of this Act.

S. 4, Act XIV of
1859.

If, in respect of any legacy or debt, the person who, but for the law of limitation, would be liable to pay the same shall have admitted that such debt or legacy, or any part thereof, is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission: Provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

(Notes)**(1) Scope of section :—**

(a) This section covers cases where the original debt remains intact and a promise or acknowledgment is made in respect of it so as to give a new starting point for limitation. It does not cover cases where the old debt is extinguished and a new contract is entered into instead. 28 W.R. 462.

(b) This section operates to give a new period of limitation by means of an acknowledgment made during the time the cause of action for recovery of a debt or the enforcement of a right is still subsisting. The renewal of a debt barred by limitation is provided for by S. 25 of the Contract Act. 3 A. 781.

(2) Minority of plaintiff :—

If the plaintiff be a minor at the date of an acknowledgment (made within the period of limitation prescribed for a suit), he will be entitled to the benefit of S. 7, though time had begun to run before the date of such acknowledgment, because the section speaks of a *new* period of limitation, not an extension of the old period. 13 M. 135.

1.—‘Before the expiration.....suit.’

(1) The acknowledgment must, in order to give a fresh starting point and save limitation, have been made within the period of limitation prescribed for the suit. 2 A. 443.

(2) Acknowledgment after the period of limitation :—

An acknowledgment made after the claim is time-barred cannot save limitation. 5 A.W.N. 194.

(3) Acknowledgment during holidays :—

An ——— cannot give a fresh start for limitation simply because the right to sue was, at the date of the acknowledgment, surviving on account of the holidays, though the time ordinarily allowed for the suit had expired. 4 Bom. L.R. 608.

(4) Adjustment of account :—

An ———, if it should be used as an acknowledgment of liability, must be made in writing and signed *before* expiry of the period of limitation. 6 B. 683.

(5) Second acknowledgment :—

A second acknowledgment made within “the new period” arising from a first acknowledgment made within the period prescribed for the suit, keeps alive the original liability. 11 B. 282 (6 C. 340).

(6) Series of acknowledgments :—

Where a series of acknowledgments of a debt have been made, each within three years of the one next preceding, and the first of the series has been made within three years of the date on which the debt was contracted, a suit for the recovery thereof is in time, if instituted within three years from the date of the last acknowledgment. 6 C. 340—5 C. L.R. 121.

Compare 2 Bom. L.R. 1096—25 B. 330 under the heading 3 A. No. 15, *infra*.

1.—'Before the expiration.....sult.'—(continued).

(7) Acknowledgment of mortgagor's title:—

An———, to give a fresh start of limitation under art. 148 of Act IX of 1871, must be an acknowledgment of a present subsisting title in the mortgagor. 9 C. 616=12 C.L.R. 284.

2.—'In respect of any property or right.'

(1) Nature of acknowledgment:—

The acknowledgment, in order to give a fresh starting point, must be one in respect of the particular claim or right: (e.g.) the acknowledgment, by defendant, of a tenancy different from that set up by the plaintiff is not sufficient under the section. 6 M. 182.

(2) Execution-proceedings, applicability to:—

The High Courts of Calcutta, Allahabad and Bombay and the Chief Court of the Punjab hold that the provisions of this section are applicable to all applications including those for execution of decrees, viewing an application for execution of a decree as 'one in respect of a property or right,' such right being the right to execute the decree. 8 C.W.N. 470; 8 C. 716; 9 C. 730=13 C.L.R. 91; 23 C. 374; 6 C.W.N. 766; 3 A. 320; 3 A. 247 (F.B.); 5 A. 201; 7 A. 424; 10 B. 108; 28 P.R. 1885.

But, the Madras High Court, in 5 M. 171 (F.B.), holds that the provisions of this section are inapplicable to applications made in the course of suits and proceedings including execution-proceedings.

INSTANCES OF ACKNOWLEDGMENTS IN EXECUTION-PROCEEDINGS:—

(1) Application to postpone sale:—

and to issue a fresh proclamation. 3 A. 247 (F.B.).

(2) Liability under decree:—

A deed acknowledging receipt of certain houses "in part-payment of the money due under a decree" passed against the debtor's father and in course of execution, is a sufficient acknowledgment of the right of the decree-holder to execute the decree. 28 P.R. 1885.

(3) Judgment-debt:—

A——— is a debt for the purposes of this section. 14 B. 390; 26 A. 36=A. W.N. (1903), 179 But see 2 C. 468; 4 C. 708; 10 W.R. (F.B.) 8=B.L.R. Sup. Vol. 967; 6 C.W.N. 766.

(4) Application for stay of sale:—

An application by the judgment-debtor for stay of the sale of his property until a certain time when, he says, he would be able to pay the decree-amount, would give a fresh starting point. 10 B. 108.

(5) Petition by judgment-debtor:—

A——— praying for time, not an acknowledgment. 3 C.L.R. 572.

(N.B.)—This decision was under the old Act (IX of 1871). Under the present Act, such a petition will be an acknowledgment of liability by reason of the additional words, "or make an application" in the present section.

2.—‘In respect of any property or right.’—(continued).

INSTANCES OF ACKNOWLEDGMENTS IN EXECUTION-PROCEEDINGS.—(continued).

(6) Joint application :—

A joint application by the judgment-creditor and the judgment-debtor stating the payments made towards, and the balance due under, a decree, is a sufficient acknowledgment so as to give a fresh starting point of limitation for execution. 16 A. 228=14 A.W.N. 55.

- (7) An acknowledgment made in course of execution by the execution of an agreement by judgment-debtor creates a fresh period of limitation for execution. 7 A. 424=5 A.W.N. 76 [following 3 A. 247 (F.B.) and 5 A. 201].

(8) Endorsement on decree :—

An ——— made by the judgment-debtor of part-payment of the decree amount will constitute an acknowledgment of liability under this section and will give a fresh starting point. 5 A. 201=2 A.W.N. 221 [following 3 A. 247 (F.B.)].

3.—‘Acknowledgment of liability in respect of such property or right.’

(NOTE).—The decisions under this heading (i.e., No. 3) cover this portion of the section, as also Explanation 1, which has to be read therewith.

(1) Requisites of acknowledgment :—

- (a) An acknowledgment, to come within the section, must be an acknowledgment of *liability* to the person seeking to recover possession or to some one he claims under. 14 C. 801=14 I.A. 168 (F.C.).

- (b) It is not required that the acknowledgment should specify every legal consequence of the thing acknowledged :—

Example.—An acknowledgment by one of two joint-debtors that the original debt was a joint debt is sufficient to keep alive the right of the other to claim contribution. 25 C. 844 (851)=2 C.W.N. 402=25 I.A. 95, (P.C.).

- (c) When the right claimed is a debt, there ought, in order to give a fresh start, to be an unequivocal and unqualified admission of the debt or of the subsisting relationship of debtor and creditor. 30 C. 699=7 C.W.N. 651 (following 16 M. 220 and distinguishing 26 C. 715); 2 U.B. R. (1837-1901), 448.

- (d) The acknowledgment must, on the face of it, purport to be that of an existing liability, though the name of the creditor to whom the debt acknowledged is owing, as also the identity of the debt acknowledged in writing, may be proved by oral evidence. 25 M. 220 (F.B.).

- (e) There must be an acknowledgment of a debt *as such* involving the admission of a jural relation of debtor and creditor, and an intention to continue the relationship until the same is lawfully determined must also be evident. 16 M. 220=8 M.I.J. 35; 20 M. 289.

- (f) The acknowledgment must be an absolutely unconditional one. A letter tantamount to a statement that the writer would see whether any amount was due, will not be sufficient to give a fresh start. 31 C. 195=8 C.W.N. 168.

3.—‘Acknowledgment of liability in respect of such property or right.’—(continued).

(1)—Requisites of acknowledgment:—(continued).

- (g) This section intends a distinct acknowledgment of an existing liability or jural relation, not an acknowledgment without knowledge that the party is admitting anything. A receipt incorporating a mortgage-deed, by reference, cannot operate as acknowledgment of a subsisting mortgage. 8 B. 99.
- (h) A conditional promise to pay, when able, made after the period of limitation in respect of an old debt had expired, cannot prevent the old debt from being barred by limitation. 11 B. 580.
- (i) A promise to pay, unaccompanied by acknowledgment of the existence of a debt, cannot save limitation. 23 B. 177 (179).
- (j) A creditor who does not openly assent to an amount acknowledged by his debtor to be due to him, is nevertheless entitled to take advantage of such acknowledgment so long as it remains uncontradicted and unexplained by his debtor. 6 C. 447.
- (k) An assertion that a sum of money will be payable on the happening of an event, future and uncertain, is not an acknowledgment of a debt. 3 M. H.C. 908.
- (l) The written acknowledgment must contain an admission that a debt is due. 5 M.H.C. 90.
- (m) Part-payment of a debt is in itself no acknowledgment. To constitute an acknowledgment so as to give a fresh start for limitation, the party sued must have, in writing, authenticated by his signature, either in express terms or by reasonable construction, acknowledged and admitted that the debt or a part thereof is due from him. 2 M.H.C. 79; 81.
- (n) To satisfy the requirements of the section, there must be some principal writing of a particular date which can be relied upon by itself, when properly construed, as constituting an acknowledgment of the debt. 6 B.L.R. 550.
- (n1) All that is necessary to show is that the defendant admitted the claim of the plaintiff as of right. It is not necessary that a precise sum should be mentioned in the acknowledgment or that a promise to pay should have been made. 3 B.L.R. (P.C.) 97 = 12 W.R. (P.C.), 36 = 13 M.L.A. 37.
- (o) **Express admission:—**
 - (1) An ——— that the debt or a part thereof is due, is not necessary. 2 M. H.C. 307.
 - (2) Admission of money being due or admission of indebtedness is not essential. It is enough if the defendant acknowledges that accounts must be taken and that he would pay any money that might be found against him on such accounts being taken, though he denies that any balance was due by him. 10 M. 259.

3.—‘Acknowledgment of liability in respect of such property or right.’—(continued).

(1) Requisites of acknowledgment.—(continued).

(2) Effect of acknowledgment:—

An acknowledgment, intended only for the purpose of eliding the law of limitation cannot, by any novation of the contract, give to the creditor a right, in the absence of any stipulation to the contrary, to claim interest at a rate higher than that which the debt had borne down to the date when the acknowledgment was made. 14 M. 258 (P.C.)—18 I. A. 73.

Distinction between acknowledgment and new contract:—

(NOTE)—A distinction has to be drawn between a mere acknowledgment and a new contract. An acknowledgment of liability will, if made before the expiration of the period of limitation for a suit, give a fresh start for limitation and save the cause of action already arisen from being barred; but a contract to pay a debt barred by limitation will neither give a fresh start for limitation nor revive the cause of action already extinguished, but will be available as a new contract that may be sued on if it satisfies the requirements of S. 25 of the Contract Act.

(a) Agreement to pay a barred decree-debt:—

An agreement to pay the amount due under a decree which is barred cannot revive the decree; but it will be a valid contract supported by consideration under S. 25 of the Contract Act. 4 C. 500.

(b) Acknowledgment and contract to pay:

Acknowledgment made *before* the claim is barred will give a new period of limitation. An acknowledgment made *after* the claim is barred will be of no use whatever unless such acknowledgment amounts to a promise to pay within the meaning of S. 25 (cl. 3) of the Contract Act. 8 B.H.C.A.C. 6; 8 B. 194 (F.B.).

(b-1) “Baki deva” or “Balance due”:

The Gujarati words ——— corresponding to the English words “Balance due,” which are of common use in balancing accounts, do not of themselves amount to a promise to pay within the meaning of S. 25 cl. 3 of the Contract Act. 8 B. 405. (10 B.H.C. 375).

(c) Acknowledgment not a promise to pay:—

A bare acknowledgment does not amount to a promise to pay on which a right of suit can be based. 11 C.P.D.R. 65.

(c-1) Agreement to pass a bond:—

A document, whereby the executant acknowledges his indebtedness to the creditor to the extent of a certain amount, receives some money on the date thereof and promises to pass a bond for the consolidated sum later on, is not a mere acknowledgment but a distinct contract giving rise to a fresh cause of action. 24 B. 304.

3.—‘Acknowledgment of liability in respect of such property or right.’—(continued).

(d) Promise to pay barred debt:—

A letter expressing an intention to pay a barred debt is ineffectual as an acknowledgment under this section, but comes under clause 3, section 25 of the Contract Act. 23 M. 94.

(e) Contract to pay barred debt:—

This section does not debar a suit on a pro-note passed to secure a barred debt, S. 25, cl. 3, of Act IX of 1872, recognising the right to bring such an action. 1 B. 590; 2 B. 230.

(f) Balance of account:—

Whether a balance of account struck and signed by the debtor is a mere acknowledgment of liability or is a fresh contract constituting a new cause of action is dependent on the facts of each case. 68 P.R. 1904 128 P.L.R. 1904.

(g) Adjusted account:—

An ———— or *rusukhata* is only evidence of the debt arising therefrom serving to give a fresh start for limitation, but not a fresh contract that can be sued on separately. 22 B. 513.

A.—What ARE acknowledgments falling within the section:—

(1) Memorandum in creditor's book:—

A memorandum signed by a debtor in the creditor's book, stating that the latter is to receive a specified sum with interest at one date and another sum at another date is an acknowledgment within this section. 33 P.R. 1882.

(1-a) Memo of payments:—

Memoranda of payments made on a bond and signed by the debtor did not constitute acknowledgment under S. 4 of Act 14 of 1859. 8 W.R. 834.

(2) Application for extension of time:—

An ———— in writing by the debtor, for payment of the debt. 12 M.L.J. 351.

(3) Promise in muchilikka:—

A promise in a muchilikka, under the Rent Recovery Act, to pay rent in instalments which had already gone by, may be construed as an acknowledgment of liability to pay the amounts of such instalments. 8 M.L.J. 219=22 M. 32.

(4) Statement in record-of-rights:—

A ———— that the signatory was a mortgagee, comes within the section, though it omits to mention the name of the mortgagor. 1 A. 117 (F.B.)—Per SPANKIE J., *contra*.

(4a) Entry in settlement record:—

An ———— describing the plaintiff as mortgagor and the defendant as mortgagee will serve as acknowledgment to give a fresh starting point for redemption notwithstanding the fact that the entry does not contain the signatures of the parties. 145 P.R. 1889.

3.—‘Acknowledgment of liability in respect of such property or right.’—(continued).

A.—What ARE acknowledgments falling within the section.—(continued).

(5) Letter and reply :—

Though a letter written by a debtor to the creditor does not make mention of the sum due nor contain any promise to pay, still, if it could be inferred from the letter written by the plaintiff and demanding payment and the letter written by the debtor in reply thereto that the latter has made an acknowledgment, it is enough to save limitation. 9 B.L.R. Ap. 43.

(6) Recital in sale-deed :—

A recital contained in a sale-deed executed by two owners of a property (one of whom had mortgaged his share to the other) stating the fact of the mortgage and the amount due thereunder, is sufficient to save a suit by the mortgagee against the mortgagor for the recovery of the amount due under the mortgage. 6 B.L.R. 299.

(7) Oral agreement to extend time :—

An ———— for payment of a debt not barred at the date of such oral agreement will not contravene S. 19, or S. 25 of the Contract Act, but will give a fresh start for limitation. 4 Bom. L.R. 50.

(8) Petition of compromise :—

An acknowledgment of plaintiff's title to immoveable property made by the defendant in a petition of compromise will give a fresh starting point. 1 C.W.N. 569.

(9) Acknowledgment by son of mortgagor :—

An acknowledgment of the title of the mortgagor by the son of the original mortgagor is sufficient in law to save limitation, although the person acknowledging may have sons, who, under Hindu Law, are co-parceners by birth in the mortgage interest. 62 P.R. 1900.

(10) Recitals in a mortgage deed :—

• A statement made by certain persons in a deed of mortgage executed by them may amount to an acknowledgment of their liability under another mortgage. 9 P.R. 1997.

(11) Promise to pay—Running accounts, admission of :—

Where there is an admission by the defendant of the existence of running accounts between the parties and of the right to have the accounts taken, a promise to pay the amount to be found due may be implied. 26 C. 715=3 C.W.N. 524.

(12) Letter by drawer to drawee of hundi :—

A letter by the drawer of a hundi to the drawee, requesting him to pay the amount due upon the hundi to the creditor of the drawer, is a sufficient acknowledgment within the meaning of S. 19. 7 M. 392.

3.—‘Acknowledgment of liability in respect of such property or right.’—(continued).

A.—What ARE acknowledgments falling within the section.—(continued).

(13) Shortage certificates :—

Shortage certificates issued by the agents of certain common carriers, and letters written by the carriers themselves in reference to the short delivery, amount to acknowledgment of liability within this section. 26 B. 562—4 Bom. L.R. 447.

(14) Acknowledgment of mortgage :—

The mortgagor's speaking, in a deed, of a mortgage as a 'third mortgage' is an acknowledgment of the existence of the first and second mortgages and will give a fresh starting point if the same were made before the expiry of the period prescribed for suing on such mortgages. 5 M.L.J. 241.

(15) More than one acknowledgment :—

In a case where there are two acknowledgments in an account-book, the latter being an acknowledgment of the debt due under the first, the latter will give a fresh start, if connection between the two accounts is established. 2 Bom. L.R. 1086—25 B. 330.

(16) Averment that time has not yet arrived :—

An admission of a debt, with an averment that the time for payment has not yet arrived, will constitute an acknowledgment giving a fresh start for limitation. 3 M.H.C. 308.

(17) Acknowledgment unaccompanied by promise to pay :—

An——— is sufficient to give a fresh start for limitation though not accompanied by a promise to pay. 4 M.H.C. 385.

(18) Acknowledgment to third party :—

(a) A written——— is sufficient. 4 M.H.C. 385.

(b) An acknowledgment made by a mortgagee of the title of the mortgagor to a third party was sufficient to save limitation under Act XIV of 1859. 3 W.R. 3.

(19) Deposition :—

(a) A——— given and signed by the debtor, acknowledging liability of a debt comes within the section. Per MUTTUSWAMY AYER, J.,—16 M. 220—3 M.L.J. 35—*Contra* WILKINSON, J., *Ibid.* (followed in 20 M. 239—6 M.L.J. 206); 7 C.W.N. 654.

(b) In a redemption suit a deposition of the mortgagee in a former suit which did not contain an acknowledgment of the mortgagor's title cannot save limitation. 3 A.W.N. 202.

(20) Will :—

An acknowledgment of a mortgage in a——— is sufficient, though the name of the mortgagor and the date of the mortgage are omitted, especially where admittedly there was no other mortgage to which the testator could have referred. 16 M. 866—3 M.L.J. 191.

3.—‘Acknowledgment of liability in respect of such property or right.’—(continued).

A.—What ARE acknowledgments falling within the section.—(continued).

(21) **Acknowledgment need not be to the plaintiff:—**

Where one of two joint-debtors discharges the joint-debt and claims contribution from the other, an admission by that other that the original debt is a joint-debt, though not made to his co-debtor, is a sufficient acknowledgment to keep the right to contribution alive and to give a fresh starting point of limitation. 25 C. 844=25 I.A. 95=2 C.W.N. 402 (P.G.).

(22) **Description of property:—**

Description of property as “the mortgaged house” is sufficient for purposes of an acknowledgment under the section. 97 P.R. 1884.

(23) **Acknowledgment as surety:—**

An acknowledgment of liability, as surety, is enough to save limitation, where the defendant is sued against as a principal debtor. 10 A. 98=8 A.W.N. 13.

(24) **Wajib-ul-urz, statement in:—**

A statement in the *Wajib-ul-urz* may amount to an acknowledgment. 5 A.W.N. 300.

(25) **Written statement:—**

(a) A ———acknowledging the existence of a mortgage and containing the mark of the person to be charged with liability is sufficient to give a fresh starting point. 16 P.R. 1891.

(b) A ———in a former suit containing a distinct acknowledgment of a mortgage and made within the period of limitation will give a fresh start of limitation under this section. 20 P.R. 1887.

(26) **Balance account:—**

A written ———signed by the debtor, but containing no undertaking to pay the amount and nothing, express or implied, to show that the debtor agreed to pay, can merely amount to an acknowledgment and give a fresh starting point in respect of items not already barred, but cannot amount to a contract to pay a barred debt. (S. 25 of the Contract Act). 36 P.R. 1886.

(27) **Assigning a wrong date:—**

An acknowledgment of a mortgage which is otherwise good cannot be rendered useless for purposes of saving limitation, simply because a wrong date is assigned to the mortgage. 26 A. 313=1 A.L.J. 1=A.W.N. (1904), p. 38.

B.—What are NOT acknowledgments falling within the section.

(a) **Debtor’s signing an award:—**

A ———made on an arbitration specifying that certain debts were to be paid off by certain parties, would not give the creditor a fresh cause of action against the debtor so signing, but, at the most, would give a fresh start of limitation. 17 A.W.N. 144.

3.—'Acknowledgment of liability in respect of such property or right.'—(continued).

B.—What are NOT acknowledgements falling within the section.—(contd.).

(b) Acceptance of a sale certificate :—

The acceptance of a sale certificate by the purchaser of a mortgagee's interest is not an acknowledgment of the title of the mortgagor and cannot give a fresh starting point for redemption. 6 M. 325.

(c) Entries in Settlement-records :—

(1) An entry in the proprietor's column of Settlement-Records, to the effect that certain lands had been held on mortgage, without any special signature, cannot avail to give a fresh starting point. 116 P.R. 1891.

(2) Certain items in the *Kheval* in a village settlement record read with a clause in the *wajib-ul-urz*, held not to amount to an acknowledgment saving the right of redemption of the representatives of the original mortgagor. 68 P.R. 1888 (98 P.R. 1877 and 32 P.R. 1880).

(d) Acknowledgment by minor :—

An——given by a minor, acknowledging the mortgagor's title, is inoperative and cannot give a fresh starting point of limitation. 59 P.R. 1901.

(e) Statement of balance in account books :—

A——in plaintiff's account books duly verified without any signature of defendant (who could not write) is not an acknowledgment that could give a fresh start for limitation; nor could the name of an illiterate defendant in one column, taken together with a cross in another, form a valid signature. 10 W.R. 298.

(f) Granting of time for payment :—

A writing granting time for payment of a debt does not come within the section; the section covers only a mere acknowledgment of a debt being due. 17 W.R. 406.

(g) Acknowledgment without specification :—

(1) An acknowledgment worded thus :—"Remittance of £ 40 to old account" held to be ambiguous and did not necessarily import that a further sum was due. 5 B.L.R. 619.

(2) A document worded thus :—"If I have to stump up, the sooner it is done the better, though it would go against all my ideas of justice and right"—held to constitute no acknowledgment. 6 N.W.P. 306.

(3) A letter containing no distinct admission of a debt but only doubtful expressions cannot amount to an acknowledgment. 2 N.W.P.H.C. 403.

(h) Entry in debtor's own books :—

An entry in a debtor's own book does not amount to an acknowledgment, unless communicated to his creditor or to some one on his behalf. 10 B. 71.

3.—‘Acknowledgment of liability in respect of such property or right.’—(continued).

B.—What are NOT acknowledgments falling within the section.—(contd).

(i) Unsigned balance of account:—

Where an entry of a balance found to be due in the plaintiff's account-book was neither written nor signed by, nor on behalf of, the defendants, the entry would not be an acknowledgment of liability so as to save limitation. 1 A.W.N. 87.

(j) Acknowledgment coupled with a set-off:—

Where the suit is for recovery of a sum due under a contract for work done, a letter from the defendant containing a demand for a sum of money accompanied by an admission of a set-off reducing the amount demanded cannot amount to an acknowledgment so as to save limitation. 60 P.R. 1887.

(k) Acknowledgment by Revenue Commissioner:—

In a suit against Government for lands taken up by it, a letter by the Commissioner of Revenue expressing his willingness to recommend to Government would not be an acknowledgment of the liability of the Government. 11 W.R. 1.

(OLD LAW.)

(l) Acknowledgment under the Punjab Code:—

Under the Punjab Code and before Act XIV of 1859 took effect in Oudh, letters offering to pay a debt by instalments and praying to be excused from payment of interest were held to be sufficient acknowledgments. 5 W.R. (P.C.) 18 = 13 M.I.A. 362.

(m) Decree partly in favor of plaintiff and partly in favor of defendant:—

Where there is a ——— an application for execution by one cannot operate as an acknowledgment so as to give a start for limitation to the other, the two portions of the decree being several and not joint. 22 B. 998.

(n) Acknowledgment during holidays:—

An acknowledgment given after three years from the date of a bond (the period, prescribed for a suit thereon) but while the right of suit subsisted, owing to the intervention of the vacation, during which the Courts were closed, did not give a fresh start for limitation under this section. 26 B. 782 = 4 Bom. L.R. 608.

C.—Acknowledgment affected by Stamp Laws.

(1) Acknowledgment when liable to stamp-duty:—

An acknowledgment of a debt must, in order to be liable to stamp-duty, have been intended to supply evidence of a debt. 30 C. 687.

(2) Unstamped acknowledgment—collateral purpose:—

Though an unstamped acknowledgment cannot be “acted upon” as an acknowledgment of a particular sum being due, still it may be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold. 18 B. 614.

3.—'Acknowledgment of liability in respect of such property or right.'—(continued).

C.—Acknowledgment affected by Stamp Laws.—(continued).

(3) Admissibility of unstamped acknowledgment:—

(a) An acknowledgment of a debt (where it is intended to supply evidence of the debt) requiring to be stamped under article 1, Sch. 1 of Act I of 1879 could not be admitted in evidence, if unstamped, even for the purpose of saving limitation. 21 B. 201 (F.B.) (*distinguishing* 18 B. 614).

(b) An—before the period of limitation for a suit had expired will save limitation, though it is unstamped: such letter not being written with the intention of supplying evidence of the debt and there being in existence, at the time, other evidence of the same. 15 A. 56= 12 A.W.N. 234.

(4) Insufficiently stamped deed:—

An—, though inadmissible in evidence as a pro-note, will be admitted in evidence for the purpose of proving an acknowledgment of a debt, if it contains such an acknowledgment. 3 A. 581 (F.B.), SPANKIE, J., *dissenting*.

(5) Unstamped balance sheet:—

An— signed by a *gumstah* of a business showing a balance due by him to the owner of the business is not an acknowledgment of a debt and does not require to be stamped. 15 C. 162 (*following* 9 C. 127).

D.—Acknowledgments affected by Registration Law.

(1) A compulsorily registrable, but unregistered, deed containing an acknowledgment of a debt signed by the debtor before the period prescribed for a suit for the debt, is admissible in evidence of the acknowledgment of the debt. 5 C. 215=4 C.L.R. 361.

(2) A compulsorily registrable, but unregistered, deed may be admitted in evidence for the purpose of proving an acknowledgment of liability, notwithstanding want of registration. 3 A. 523.

(3) Receipt—acknowledgment of title:—

A compulsorily registrable, but unregistered, receipt, stamped with a one-anna stamp, will, if it contains an acknowledgment of title to immovable property, be inadmissible in evidence. 4 B. 590. *Cf.* 5 B. 232.

(4) Evidence of acknowledgment:—

A compulsorily registrable, but unregistered, mortgage-deed may be accepted as evidence of an acknowledgment of liability of a simple debt. 17 P.R. 1881; 88 P.R. 1880.

4.—'In writing.'

Verbal acknowledgment:—

(1) A mere verbal admission of the correctness of an account, the items of which are barred by limitation, is not available to give a new start of limitation. 3 M.H.C. 378.

(2) See 4 Bom. L.R. 50, noted under No. 7, Heading A *supra*.

5.—'Signed.'**(a) Markman :—**

The mark of an illiterate debtor is as good as his signature, for purposes of this section. 7 M. 55; 7 M. 76; 7 M.H.C. 358.

Compare cases (c) and (e) at p. 630, *supra*.

(b) Signature at top :—

(1) The introduction of the name of the writer of a letter at the top thereof is signature of the writer under certain circumstances. 1 A. 688.

(2) An acknowledgment written by the debtor himself with his name at the top is sufficiently signed within the meaning of this section. 5 B. 88; 89.

(3) It is immaterial where the signature is put down—bottom or top—in the acknowledgment. 10 B. 71.

(c) Writing of specified words :—

The writing of specified words by *devis* at the top and bottom of letters, shown to be the usual way, amongst persons of that class, of authenticating letters, is a "signing" within the meaning of this section. 18 B. 586 (following 7 M.H.C. 358).

(d) Affixing of seal :—

(1) is not 'signature' within the meaning of the section. 8 W.R. 513: But see next case.

(2) The affixing of a seal or stamp, on which the name of the signatory is impressed, is a sufficient signing within the meaning of this section. 185 P.R. 1883.

(e) Documents of old Burmese fashion :—

Drawing up of a document after the old Burmese fashion does not amount to signing. 2 U.B.R. (1892-96), 462 (7 M. 76, 5 B. 88, 10 B. 71).

(f) Holograph will unsigned :—

An acknowledgment in a holograph will, not signed by the testator, is not sufficient to give a fresh starting point. 15 M. 380 = 2 M.L.J. 42 (*distg.* 5 B. 88).

(g) Signature by dictation :—

If the debtor dictates to a writer to write in the Books of the creditor what would amount to an acknowledgment, it would save limitation though he did not himself write, sign, seal or mark the acknowledgment. 122 P.R. 1889.

6.—'Oral evidence.'**A.—Oral evidence admissible :—****(1) Identity of creditor and of debt :—**

Oral evidence may be given of the name of the person to whom a debt acknowledged is owing as also of the identity of the debt acknowledged.

25 M. 220 (F.B.) [following 1 A. 117 (F.B.); 16 M. 366 and 5 M.H.C. 320].

Compare 17 A. 198 = 22 I.A. 31 (P.C.) noted under Heading B. (No. 2) page 634, *infra*.

6.—‘Oral evidence.’—(continued).

A.—Oral evidence admissible:—(continued).

(2) Alteration of acknowledgment:—

Material alteration in a written acknowledgment of a debt does not render it inoperative and ineffective, the acknowledgment being only evidence of a pre-existing liability and not the foundation of the claim. 25 B. 616.

Compare 26 B. 128 = 3 Bom. L.R. 574, noted under Heading B. No. 6, *infra*.

(3) Secondary evidence:—

(a) This section must be read with Ss. 65 and 91 of the Evidence Act; and does not exclude secondary evidence in cases in which the same would be admissible under S. 65. of that Act. 15 M. 491 = 2 M.L.J. 253. (12 C. 267).

(b) ————may be given of an acknowledgment which is lost or destroyed. 13 C. 292; 12 C. 267.

B.—Oral evidence inadmissible:—

(1) Proof of existing liability:—

The acknowledgment must in itself import an existing liability; such liability cannot be read into it by proof *aliunde* or by a subsequent admission of the acknowledgor. 26 M. 84 = 12 M.L.J. 101.

(2) Identity of debt:—

Where there is an acknowledgment of a debt, more than one debt being due to the creditor at the time, the acknowledgment must be such as to identify the particular debt sued on. Oral evidence cannot be admitted in this respect. 17 A. 198 = 22 I.A. 31 (P.C.).

(3) Want of written acknowledgment:—

Oral evidence cannot be admitted to supplement the want of a written acknowledgment. 8 W.R. 289; 7 W.R. 46.

(4) Personal liability:—

(a) S. 92, Proviso 6 of the Evidence Act cannot be used for the purpose of importing into a letter an acknowledgment of personal liability for a debt, which is not contained in it even by implication. Previous correspondence cannot be so used. 2 P.R. 1884.

(b) Case in which the P. C. held that an authority to acknowledge the personal liability of a debtor could not be implied from a *Mukhtarnamah* to an agent. 17 A. 198 = 22 I.A. 31 (P.C.).

(5) Contents of acknowledgment:—

Oral evidence of the contents of an acknowledgment cannot be received, nor is there any saving of acknowledgments received or given back before this Act came into force. 12 B. 268.

(6) Alteration of date:—

Where a written acknowledgment bears a date which has been altered in an unauthorized manner, oral evidence to prove that date is inadmissible. 3 Bom. L.R. 574 = 26 B. 128 (*distinguishing* 25 B. 616).

(7) Intention of acknowledgor:—

The ———— that he meant such and such a debt cannot be proved by his evidence. 17 A. 191 = 22 I.A. 31 (P.C.).

7.—'Agent duly authorized.'

(1) Acknowledgments by agents:—

- (a) When a suit is brought on an acknowledgment of debt made by one person on behalf of another, it must be shown that the former had power to acknowledge a debt for the latter. 2 C.P.L.R. 40.

Agency:—

- (b) An ———, within the meaning of Explanation 2, cannot be inferred from the mere fact that the person making the acknowledgment is a joint contractor. 25 M. 220 (F.B.).

(2) Acknowledgments after termination of agency:—

- (a) An acknowledgment signed by an agent after the termination of the agency will be of no avail to save limitation. 5 C. 308; 7 I.A. 8 (P.C.)
- (b) An acknowledgment signed by a person whose agency on behalf of the defendant had ceased to the knowledge of the plaintiff, cannot save limitation. 6 C.L.R. 101 (P.C.).

(3) Signed by another at debtor's request:—

- (a) A balance of account written by a person at the request of an illiterate debtor in the debtor's name and signed by the writer in his own name, held to be a binding acknowledgment by an authorized agent. 7 B. 515.
- (b) A letter (containing an acknowledgment) headed as addressed by the principal to a creditor and written by an agent, the last portion of the letter being written by the principal himself, held to be an acknowledgment by the agent. 1 A. 683.

(4) Acknowledgment by one of two mortgagees:—

- (a) An ———, where they are joint mortgagees and the mortgage is not redeemable piecemeal, cannot avail to save the mortgagor's right to redeem from being barred. 18 A. 458; 1 A.L.J. 355; 157 P.R. 1888; 61 P.R. 1877.
- (b) An acknowledgment signed by one of several mortgagees or by one of the several heirs of a mortgagee, will not save the suit as against the others. 17 B. 173.

(5) Acknowledgment by one of several co-obligors or mortgagors:—

When a creditor enters into a transaction with all the members of a family as co-obligors, an acknowledgment made by one of them cannot be regarded as an acknowledgment duly made on behalf of all the co-obligors, though the person acknowledging is the managing member of the family consisting of the co-obligors. 25 M. 220 (F.B.).

(6) Striking balance by one of two partners:—

The acknowledgment by one of two partners, when the business of the partnership has ceased, cannot give a fresh starting point, the partner signing not being an agent of the firm. 140 P.R. 1889.

7.—'Agent duly authorized.'—(continued).

(7) Acknowledgment by Sarabarakhar:—

A *sarabarakhar*, not being the guardian of the property of a disqualified proprietor, cannot have authority to admit the personal liability of the disqualified proprietor to the debt. 17 A. 198 = 22 I.A. 31 (P.C.).

(8) Natural guardian:—

(a) An acknowledgment by a ———— and mother of a minor will give a fresh start for limitation, if it be shown that such acknowledgment is for the benefit of the minor. 4 Bom. L.R. 812 [26 B. 221 = 3 Bom. L.R. 817 (F.B.)] *overruling* 20 B. 61.

(b) A guardian of a minor has authority to acknowledge a debt so as to keep it alive against the minor, provided the acknowledgment is made before the debt was barred. 17 M. 221 (*following* 5 M. 169, F.B.).

(c) Although a guardian of two minors may have power to manage or to make partition of the estate, he has no power to bind the estate of either of the wards by admissions of previous transactions. 10 C.L.R. 377 (P.C.).

(d) A ———— cannot acknowledge and give a fresh start as against a minor. 13 C.L.R. 112.

(9) Mother:—

A ———— has no power to bind her minor son by an acknowledgment and thus give a fresh start for limitation. 13 C. 292.

(10) Manager of a joint Hindu family:—

The ———— has the same authority to acknowledge as he has to create debts on behalf of a minor though he has no power to revive debts barred by time except with special authority. 5 M. 169 (F.B.); 17 B. 512.

(NOTE).—5 M. 169 *overrules* 1 M. 385.

(11) Guardian under Act VIII of 1890:—

A guardian appointed under Act VIII of 1890 (The Guardians and Wards Act) can extend, by means of an acknowledgment, the period of limitation as against the ward, provided such act be for the protection or benefit of the ward's property. 26 B. 221 = 3 Bom. L.R. 817 (F.B.). This case *overrules* 20 B. 61.

But see 26 C. 51, which holds (*following* 13 C.L.R. 112 and 13 C. 292) that there is no difference between an acknowledgment given by a certificated guardian and that by an uncertificated guardian, and that neither can give a fresh start for limitation.

(12) Guardian under Act XL of 1888:—

(a) A ———— can sign an acknowledgment and give a fresh starting point. 25 P.R. 1886.

Acknowledgment by one of two guardians:—

(b) An ———— would give a fresh starting point, if it was in the ordinary course of business and if the other guardian had left the whole of the management of the business on the minor's behalf to the former. 7 P.R. 1890.

7.—'Agent duly authorized.'—(continued).

(18) Collector as agent of the Court of Wards :—

- (a) A ——— has no authority to make an acknowledgment on behalf of a ward under the Court of Wards and thus give a fresh start for limitation. 10 W.R. 175.
- (b) A written statement by the Collector as representing an incapacitated mortgagee under the Court of Wards giving the date of the mortgage may be admitted in evidence for the purpose of proving the date of the mortgage, the mortgage deed being lost. 8 A.W.N. 187.

(14) Acknowledgment by Legal Practitioners :—

- (a) Letter by defendants' attorney to plaintiffs' attorney to the effect that the defendants were willing to pay the rent in question in case the plaintiffs should show a title to give a good receipt to the defendants that would satisfy their lawyers, held to be a sufficient acknowledgment, within the section. 26 C. 204 = 2 C.W.N. 718.
- (b) A letter by a Mukhtar of a *raisat*, giving the date of a mortgage, may be admitted in evidence for the purpose of proving the date of the mortgage, the deed of mortgage being lost. 8 A.W.N. 187.
- (c) An admission made by an advocate or a duly authorised vakil of a judgment-debtor, in a case not *inter partes*, that a certain decree was subsisting, would give a fresh starting point to the decree, if such admission was relevant to the other case. 18 A. 384 = 16 A.W.N. 101. (following 3 A. 247).
- (d) The payment of part of a judgment-debt by the judgment-debtor, with an acknowledgment of liability by his pleader, is sufficient to give a fresh start. 22 B. 722 (10 B. 108 ; 16 A. 228 ; 9 C. 790 ; 23 C. at p. 387).
- (e) A petition signed by the vakil of a judgment-debtor, praying for additional time for payment of the amount of the decree, was a sufficient acknowledgment of liability under this section. 8 C. 716 = 10 C.L.R. 618 ; 9 C. 790 = 18 C.L.R. 91.
- (f) A petition put in Court, signed by the vakil of the judgment-debtor, admitting liability for the judgment-debt and making payment of certain amount, would save limitation, the petition operating as an acknowledgment of liability. 23 C. 374.
- (g) An acknowledgment by an agent, (e.g.) a vakil, before the Act of 1871 came into force, could not keep a claim alive, because, under the earlier Limitation Act, an agent had no authority to sign such an acknowledgment. 8 B.*99.

'Authority of agents to revive barred debts.'

- (a) A power of attorney authorizing an agent to execute bonds in substitution of former debts does not authorize the agent to renew barred debts by giving new bonds in substitution. 11 C.L.R. 581.
- (b) Hindu father :—
A Hindu father can bind his son by reviving a barred debt. The son will be bound to pay such debt from any of the assets of the father. 6 M. 298.

'Authority of agents to revive barred debts.'—(continued).

(c) Manager of a Hindu family :—

A manager of a joint Hindu family cannot revive, by acknowledgment, a debt barred by limitation, except as against himself. 20 B. 155 ; 14 B.L.R. O.C. 21.

(d) Hindu widow :—

It is competent to a Hindu widow representing her husband's estate to bind the reversion by reviving a barred debt. 13 M. 189.

'Acknowledgments by Agents before Act IX of 1871.'

(a) An acknowledgment by an agent, such as a vakil, made before Act IX of 1871, was insufficient to give a fresh start for limitation, because Act XIV of 1859 contained no provision for acknowledgments by agents. 20 W.R. 375 = 13 B.L.R. 177 (P.C.) ; 1 A. 642 ; 3 A.W.N. 202 ; 8 W. R. 1 ; 8 B. 99.

(b) Acknowledgments signed by agents, which were insufficient under Act XIV of 1859 to keep alive a cause of action, became sufficient for that purpose under Act IX of 1871. 6 C. 340 = 7 C.L.R. 121.

'Acknowledgments re mortgages before Act XIV of 1859.'

- (1) In order to save a suit for redemption of a mortgage executed before Act XIV of 1859, the acknowledgment must be made between the creation of the relationship of mortgagor and mortgagee and before the end of the period of limitation. 6 M.H.C. 138.
- (2) An—, to keep alive a cause of action to redeem a mortgage, must be signed within 60 years of the mortgage, under S. 1, cl. 15 of Act XIV of 1859. 5 M. 182.
- (3) Before Act XIV of 1859 there was no limitation for suits for redemption of mortgages. An acknowledgment of a mortgage was made, prior to the enactment of Act XIV of 1859, by the representatives of a mortgagee, of the mortgagor's title. *Held*, such acknowledgment sufficient to give a new period of 60 years from the date of the acknowledgment. 1 A. 425.
- (4) An acknowledgment made, after lapse of 60 years from the date of mortgage and before Act XIV of 1859, could not avail the plaintiffs suing for redemption after Act IX of 1871 came into force. 109 P.R. 1884.
- (5) A suit for redemption of a usufructuary mortgage will not be barred even though the mortgage be more than 100 years old, if there be an acknowledgment of the mortgagor's title within the period of limitation. 14 A.W.N. 87.
- (6) Where, in the case of a suit to redeem a mortgage made more than 60 years before the 1st October 1877, an acknowledgment was set up to save limitation it was necessary to show that the acknowledgment was sufficient under Art. 148 of Act IX of 1871, so as to keep the claim alive until the present Act became Law. 58 P.R. 1894.

'Acknowledgments re mortgages before Act XIV of 1859.'—(continued).

- (7) An acknowledgment by a mortgagee within sixty years from the date of a mortgage, to the effect that the land belongs to the mortgagor and that the mortgage is subsisting, is sufficient to give a fresh starting point for a suit for redemption. 6 Bom. L.R. 38.
- (8) In cases of mortgages executed before the coming into force of Act XIV of 1859, an acknowledgment of the mortgagor's title must be made within 60 years from the date of the mortgage so that it may serve as a new starting point of limitation. Otherwise, the suit will be barred after the expiry of 60 years from the date of the mortgage. 27 C. 1004=27 I.A. 103=4 C.W.N. 565 (P.C.)

20. When interest on a debt⁽⁵⁾ or legacy is, before the expiration

Effect of payment
of interest as such.

of the prescribed period⁽⁶⁾, paid as such⁽¹⁾ by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

or when part of the principal of a debt⁽²⁾ is, before the expiration

Effect of part-pay-
ment of principal.

of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf⁽³⁾,

a new period of limitation, according to the nature of the original liability⁽⁷⁾, shall be computed from the time when the payment was made :

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the hand-writing of the person making the same⁽²⁾.

Where mortgaged land is in the possession of the mortgagee, the

Effect of receipt of
produce of mortgag-
ed land.

receipt of the produce of such land⁽⁴⁾ shall be deemed to be a payment for the purpose of this section.

S. 21, Act IX of 1871. [Same as above—but the proviso ran as follows :—

Provided that in the case of part-payment of principal, the debt has arisen from a contract in writing, and the fact of the payment appears in the hand-writing of the person making the same, on the instrument, or in his own books, or in the books of the creditor.

(N. B.)—The last clause of the present section was not found in S. 21 of Act IX of 1871.

Act XIV of 1859.—No corresponding provision.

(Notes)

1.—'Payment of interest as such.'

(1) Payment of interest as such :—

(a) Payment must be made as 'such' (i.e.) as for interest. Payment when no amount was due for interest, cannot be such a payment as would give a fresh start for limitation. Nor would payment *after* the expiration of the period give a fresh start. 2 U.B.R. (1892-1896) 466.

(b) The meaning of the section is that there must be either an express intimation by the debtor or proof of the existence of circumstances going to show that the payment was on account of the interest on the particular debt sued on. 15 C.P.L.R. 29.

(2) Delivery of goods :—

— for payment either of principal or interest, as such, will save limitation. 24 B. 619—2 Bom. L.R. 452.

(3) Payment of interest :—

(a) — by the principal debtor within limitation does not give a fresh starting point for limitation against the surety even in the absence of any prohibition by the surety against the payment of interest by the debtor on his account. 28 B. 248—5 Bom. L.R. 1020.

(b) Where, apart from a document which is inadmissible in evidence for want of registration, the receipt of certain sums as interest cannot be proved, the receipt of the amounts cannot save the suit from limitation. 19 B. 668.

(4) Banker's crediting interest :—

Banker crediting interest is not payment to give fresh starting point, though the entry was made in the presence of the customer (plaintiff), there being no demands on both sides to set off against one another. 13 B. 338.

(5) Credit without actual payment :—

A mere credit of interest entered in the accounts of the defendants, without actual payment, is not a sufficient payment of interest as such, under this section, to save the bar of limitation. 19 M. 340—6 M.L.J. 177.

2.—'Part-payment of principal.'

(NOTE).—This portion of the section and proviso 1, have to be read together.

(1) Evidence :—

The writing evidencing the part-payment of the principal need not, on the face of it, show expressly that the payment was made as such. *Per* BANERJEE, J., 6 C.W.N. 218.

(2) Endorsement of a cheque :—

in favor of the creditor, is not enough to satisfy the requirements of the section. 9 M. 271; 19 A. 307—17 A.W.N. 49.

(3) Part-payment—Cheque :—

Where an insolvent in debt to a bank addressed a letter to the bank enclosing a cheque for certain amount and requesting that it should be placed to the credit of the loan account, *held*, the payment was a part-payment and the fact of such part-payment appeared in the handwriting of the debtor within the meaning of S. 20 of the Act. 23 C. 592.

2.—Part-payment of principal.—(continued).

(4). Part-payment of principal :—

The writing need not specify that the payment was appropriated towards principal. This may be proved otherwise. If the fact of payment appears in writing, it is enough. 6 M. 281.

(5) Settlement of accounts :—

A payment need not necessarily be in money. It may be by adjustment of accounts, with the consent of both parties, if such adjustment should afford a complete answer to the creditor's claim. 24 B. 498—2 Bom. L.R. 378.

(6) Entries of credits in Plaintiff's accounts :—

Where, subsequently to the adjustment of his account with the plaintiffs, the defendant had been credited with certain amount, such credits not being signed by the defendant: such amount was not payment within the meaning of this section. 6 R. 104 (3 B. 196).

(7) Sum realized in execution :—

A sum realized by an execution-sale cannot be considered part-payment so as to give a new period of limitation. 6 R. 626; 24 W.R. 20; 25 W.R. 249.

(8) Payment of judgment-debt :—

An uncertified payment of a judgment-debt out of Court, may be taken into consideration for seeing whether an execution-application is or is not barred by limitation. 26 A. 36=A.W.N. (1903), p. 179 (following 17 A. 42 and 21 B. 122; and overruling 12 A. 569).

(9) Endorsement of part-payment on decree :—

See 5 A. 201=2 A.W.N. 221, noted under S. 19.

(10) Endorsement without payment :—

An endorsement of part-payment upon a bond is sufficient to save limitation, though there is no actual payment at the time of the endorsement. 10 M.L.J. 25.

(11) Payment generally for principal and interest :—

A ———, without specifying what part is to be appropriated for principal and what for interest, is a payment for interest as such, and serves to give a fresh start for limitation. 4 Bom. L.R. 281.

(12) Payment without appropriation :—

But a payment generally towards a debt, without any thing to show whether it is made on account of principal or interest, or both, or indefinitely or on general account, cannot serve to extend time. 5 Bom. L.R. 350.

(13) Object of proviso :—

The main object of the proviso is that there should be clear and unmistakable evidence, in the handwriting of the person making the payment, of the fact that he made it in part-payment of principal and thereby impliedly admitted that he was still liable for payment of the balance of principal. The creditor is not entitled to prove *aliunde* that the payment of a sum of money by his debtor was made as part-payment of the principal debt. 124 P.R. 1894.

2.—'Part-payment of principal.'—(continued).

(14) **Requisites of part-payment :—**

In order to give a new starting point, the fact of part-payment must appear in the handwriting of the person making the same, and not in the handwriting of any other person, however authorized he may be. 23 C. 546 (F.B.).

(15) **Handwriting of the person, &c. :—**

Part-payment of the principal must be in the handwriting of the person making it, and not in that of any other person. 26 B. 246.

(16) **Application to Collector in Execution :—**

A joint———of a decree, the same having been transferred to him for execution, stating that a certain amount was paid by the judgment-debtor to the decree-holder and that the balance was due, is sufficient to save limitation under this section. 16 A. 228=14 A.W.N. 55.

(17) **Mark—Illiterate person :—**

The signature of the payer, or the affixing of his mark beneath an endorsement not written by him, is sufficient to satisfy this section. 7 M. 55; 7 M. 76; 28 B. 262=5 Bom. L.R. 1031.

(18) **Endorsement signed by debtor :—**

Though an endorsement of payment of principal of a debt is not in the handwriting of the payer, it is sufficient, for purposes of this section, if it be signed by him. 99 P.R. 1884.

3.—'Agent duly authorized.'

(1) **Implied authority :—**

The authority of an agent to make part-payment of principal or interest and give a fresh start for limitation, may be implied. 17 C. 944.

(2) **Payment by guardian :—**

A guardian appointed under Act VIII of 1890 can make a part-payment of the principal and thus extend the period of limitation, provided such part-payment is for the protection or benefit of the ward's property. 26 B. 221 (F.B.)=3 Bom. L.R. 817.

(3) **Agent—Certified guardian :—**

The certified guardian of a minor is an agent authorized to pay interest, within the meaning of this section. 29 C. 647=6 C.W.N. 729 (26 C. 51; 20 B. 61).

(4) **Payment by previous guardian :—**

The payment of interest by the previous guardian of a debtor remaining in management after the debtor's majority, is a payment by "a person duly authorized" within the meaning of this section. 18 M. 456 (18 C. 292, 5 M. 169 (F.B.); 17 M. 221; and 17 B. 512).

(5) **Natural guardian—mother :—**

A mother (the natural guardian of minor debtors) cannot be regarded as a 'duly authorized agent' so as to be able to give a fresh starting point by making payment of interest. 1 A.L.J. 302=A.W.N. (1904) 137,

3.—‘Agent duly authorized.’—(continued).

(6) Payment by joint Manager :—

Payment of interest towards the original debt made by the joint manager of two joint debtors authorized to pay up, out of joint funds of the joint debtors, interest upon joint debts, is sufficient to give a fresh starting point to the right of one of the debtors to claim contribution from the other. 25 C. 844=2 C.W.N. 402=25 I.A. 95 (**P.C.**).

(7) Payment by agent of Court of Wards :—

Payment of money made in pursuance of an order of the President of the Court of Wards to the creditor of a ward, on account of the debt due to him, would not amount to part-payment within the meaning of section 20, though the order directing the payment would amount to an acknowledgment so as to save limitation. 1 P.R. 1897.

4.—‘Receipt of produce of mortgaged land.’

(1) Scope of clause :—

This clause is intended to extend the time for a suit by a usufructuary mortgagee to recover the debt, but is not intended to override the general provision as regards limitation for suits for redemption to be found in art. 148. 18 A. 295=16 A.W.N. 68; 26 A. 167; A.W.N. (1903) 223; [*dissenting* from A.W.N. (1891), p. 87].

(2) Receipt of produce :—

The receipt by mortgagee of the produce of land mortgaged to him is a payment within the meaning of S. 20. 13 M.L.J. 83=26 M. 686 (**F.B.**).

(3) Suits by mortgagee and mortgagor :—

A mortgagee suing for the money due under a mortgage may avail himself of the payment of produce to save limitation; but such payment may not avail a mortgagor suing to redeem. He can only succeed on the strength of an acknowledgment under S. 19. 37 P.R. 1883.

(4) Receipt of profits :—

The receipt of the produce of land held under a deed of mortgage required to be, but not, registered, cannot be deemed to be a payment for the purpose of this section, because the unregistered deed is inoperative to create a valid mortgage. 7 M. 539.

5.—‘Debt.’

Debt :—

(a)—in this section, does not include judgment-debts. The provisions of this section re part-payment of debts do not apply to judgment-debts. 6 C.W.N. 766; 2 C. 468; 4 C. 708.

(b) But, the word ——— includes also a judgment-debt. 14 B. 390; 26 A. 36=A.W.N. (1903), 179 (*dissenting* from 2 C. 468, 4 C. 708 and 6 C.W.N. 766).

(c) Decree-debts :—

Part-payments of decree-debts made by judgment-debtor out of Court, do not save limitation, notwithstanding that such payments are certified to Court by the decree-holder. 61 P.R. 1886.

6.—'Prescribed period.'

(1) Prescribed period :—

The words "prescribed period" in the section mean, not the period prescribed for the payment of the debt, but the prescribed period of limitation for the suit. 6 C. 815=8 C.L.R. 457; 12 C.L.R. 277.

(2) Extension of period :—

It is not law that the section gives only one extension of the period. Every time a payment is made, provided it is in time, the period is extended. 11 M. 218 (6 C. 340, 11 B. 282.)

(3) Payment within, but endorsement after time :—

A——— is sufficient to give a fresh starting point. 17 M. 92.

7.—'Original liability.'

Liability for damages :—

The part-payment after due date of principal and interest due under a bond will not give a fresh starting point in respect of a claim for damages for non-payment of principal and interest on the due date, the liability for damages not being the original liability under the bond. 12 A.W.N. 239.

One of several joint contractors, &c., not chargeable by reason of acknowledgment or payment made by another of them.

21. Nothing in sections 19 and 20 renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only⁽¹⁾ of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them.

(Old Acts)

Sec. 20. Exp: 2.
Act IX of 1871.

[Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.]

Sec. 4 proviso
Act XIV of 1859.

} Noted under sec. 19, at page 620, supra.]

(Notes)

1.—'Only.'—

(1) Interpretation :—

The word "only" in section 21, of the Limitation Act (XV of 1877), is not to be treated as a surplusage. It means that the mere writing or signing of an acknowledgment by one partner does not, necessarily, of itself bind his co-partner, unless it can be shown that he had otherwise power to bind that partner for the purpose of making such acknowledgment, and in effect purported so to bind him. 10 A. 418=8 A.W.N. 98.

(2) Acknowledgment during subsistence of partnership :—

Acknowledgment by a partner during the subsistence of the partnership must, in order to save limitation, be an act necessary for, or usually done in, carrying on the business of the partnership. 26 B. 42=8 Bom. L.R. 484 (distinguishing 10 B. 358).

1.—' Only.'—(continued).

(3) Acknowledgment after dissolution :—

Acknowledgment by a partner after dissolution of the business cannot save limitation if the creditor had, at the date of acknowledgment, notice of the dissolution. 26 B. 42=8 Bom. L.R. 484 (*distinguishing* 10 B. 358).

(4) Authority of partners :—

It must be shown that the partner signing the acknowledgment had authority, express or implied, to do so ; otherwise the acknowledgment will not bind the other partners. In a going mercantile concern such authority will be presumed as an ordinary rule. 10 B. 358 ; 1 P.L.R. p. 18=45 P.R. 1899.

(5) Concurrence of partners :—

Though one partner cannot make the others liable merely by his signature, still there is nothing to prevent such liability from falling on them, if they are all shown to have joined in the settlement made by him. 24 B. 498.

(6) Acknowledgment by surviving partner :—

Where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased by their acknowledgment, unless they are specially authorised to do so. 8 M. L.J. 261.

(7) Plea as to status in appeal :—

The question, whether the person, who signed an acknowledgment, had the status of a partner at all and whether he was authorized to make such acknowledgment, cannot for the first time be raised in appeal. 25 W. R. 145.

(8) Admission of partner :—

An admission by a partner, that an acknowledgment of a debt made by another partner, at a time when the firm had stopped business, was made on the authority of the firm, cannot bind him. 140 P.R. 1889.

22. When, after the institution of a suit, a new plaintiff or defendant is substituted or added⁽¹⁾, the suit shall, as regards him, be deemed to have been instituted when he was so made a party :

Effect of substituting or adding new plaintiff or defendant.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff :

Proviso where original plaintiff dies.

Provided also that, when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.

Proviso where original defendant dies.

(Old Acts).

[Sec. 22, Act IX of 1871.—Almost same as above.

Act XIV of 1859.—No corresponding provision].

(Notes)

Scope of Section.

(1) Powers of appellate Court :—

- (1) The appellate Court has a discretionary power to substitute or add a new appellant or respondent after the period of limitation prescribed for an appeal. 2 A. 107; 9 C. 355; 8 W.R. 367.
- (2) The Court may add a person as respondent in an appeal, though the time within which an appeal might have been preferred as against him has expired. 14 A. 154 (F.B.); 13 A. 78. Cf. 11 C.L.R. 430.
- (3) Where a suit, brought against two defendants as jointly and severally liable on a contract, is decreed against only one of them and the unsuccessful defendant alone appeals against the plaintiff, it is open to the appellate Court to join the exonerated defendant as a party to the appeal even after the expiry of limitation for an appeal by the plaintiff, but it cannot give a decree in favor of plaintiff as against the exonerated defendant, against whom the plaintiff did not appeal. 2 A. 487.
- (a) But an appellate Court has no power virtually to make an appeal for an appellant by introducing for him other respondents than those he had included in his memorandum of appeal, when the appellant has refrained from availing himself of the privileges allowed by law. 5 A. 266.
- (b) ———nor to substitute on the record the name of a person as respondent except on the application of the appellant; but if the real representative of a deceased respondent is not brought on the record by the appellant, the appeal will abate. 12 C.L.R. 45.

(2) Suits in representative capacity :—

The section applies to suits brought by plaintiffs in their representative capacity as well as to those brought in their personal capacity.

Where a plaintiff, who had obtained no letters of administration, instituted the suit, and, later on, after expiry of limitation, a person that obtained letters of administration was joined as a co-plaintiff on his own application, the suit was held to be barred and dismissed. 21 B. 580.

1. A.—'Substitution or addition of new plaintiffs.'

(1) Joint cause of action :—

- (a) When the original plaintiffs and the newly added plaintiffs having had a joint cause of action, the original plaintiffs alone sue within the period of limitation and others are added subsequently after expiry of the period of limitation, the whole suit would be barred and liable to dismissal. 6 C. 315—8 C.L.R. 457; 8 P.R. 56 (*dissenting from 8 C. 26*).

1. A.—‘*Substitution or addition of new plaintiffs.*’—(continued).

- (b) In such a case as the above, even the assent of the un-added parties to the suit being proceeded with by the original plaintiff or plaintiffs alone will not avail to save the suit from the bar of limitation and consequent dismissal. 7 B. 217.
- (c) The section would not apply, if, the defendants not having taken any objection as to non-joinder of parties and no issue having been raised, certain persons are brought in as co-plaintiffs, after the expiry of the period of limitation for the suit. 15 B. 297.

(2) Joint Promisees :—

All———must join in suing on the contract in their favor. In case of non-joinder of any, the defendant may object as to non-joinder. The Court will, in such cases, add the omitted promisees either as plaintiffs or as defendants. 156 P.R. 1889 (F.B.).

(3) Suit by co-sharers :—

- (a) Where there are several co-sharers or owners entitled to sue, all must join in instituting the suit. 10 B. 32 ; 7 C. 242 (244) ; 17 C. 160.

(NOTE).—If the sharers, not originally parties, are subsequently brought in on the record, the defendants may, it is thought, insist on the provisions of this section being applied.

- (b) A tenant put in possession by all co-sharers one of the co-sharers cannot turn him out without the consent of the rest ; in cases of trespass on joint property, the trespasser may be ejected altogether by all the co-sharers if they join, or partially, if only some wish to bring the suit. 7 C. 414.

- (c) But in a joint family, one co-owner may sue to eject a more trespasser if his object were simply to remove an intruder without claiming any portion of the property for himself exclusively. 1 A.L.J. 543.

(4) Suit by a Hindoo managing member :—

A———will not be liable to dismissal on account of the other members of the family being added as parties after the period of limitation, if the newly added major members ratify the institution of the suit by the managing member alone. 58 P.R. 1882.

As regards minor members of the family, the manager has a right to give a valid discharge on their behalf also and, consequently, has a right to sue as manager without specifically impleading the minor members. *Ibid.*

Compare 28 M. 190 and 18 M. 83—4 M.L.J. 28 noted below.

(NOTE).—It may be noted in this connection that, in 18 M. 83—4 M.L.J. 28 and 28 M. 190, it has been held that the manager of a Hindu family cannot maintain a suit, in his own name, for recovery of property belonging to the family and that, in the latter case, the High Court, in second appeal, ordered the addition of a member of the family to be joined as co-plaintiff with the managing member.

(5) Suit by a Hindu widow—addition of son :—

Where a Hindu widow brought a suit in her own name and expressly on her own behalf, and subsequently, her son was brought on record as co-plaintiff at a time when the suit as regards him was barred, the suit was dismissed, 12 B.H.C. Ap. 17.

1. A.—‘*Substitution or addition of new plaintiffs.*’—(continued).

(6) *Assignment pendente lite* :—

(a) This section does not apply to a case in which the person, to whom a right of suit is assigned after the institution of the suit, obtains leave to carry on the suit. 5 C. 720=6 C.L.R. 62.

(b) But see 25 C. 409, which holds that where, in consequence of an——the assignees are *substituted* on the record in the place of the original plaintiffs after the expiry of limitation for the suit and no leave is obtained by the assignees to carry on the suit, it will be barred under this section, though it might have been in time originally.

(7) *Actions in torts* :—

The rule that persons, having a joint cause of action, must sue jointly, is not applicable to every case of tort in which several persons are damaged by the same tortious act. The addition, after the period of limitation, of a person jointly damaged with the original plaintiff, on his own application, will not affect the right of the original plaintiff to recover damages so far as his right is concerned. 25 C. 285.

1. B.—‘*Substitution or addition of new defendants.*’

(1) *General* :—

(a) When a party is substituted or added as a defendant, the suit is commenced as against him from the time he is made a defendant, and not before, and limitation runs in his favor up to the date of his admission into the suit. 6 W.R. 298; 14 W.R. 377.

(b) Where defendants are added subsequent to the institution of a suit, the suit will be barred as against them, if, at the time when they are joined, the period limited has already expired. 9 B. 1.

(c) Where it is found that a necessary party, without whose presence the suit, as brought, could not be adjudicated upon, is added as defendant after the expiry of limitation as against him, the suit would be barred and liable to dismissal. 69 P.R. 1902.

(d) Where, in a suit for property in the possession of several persons, some of them are added as defendants after the period of limitation against them has elapsed, the suit as against the added defendants must be dismissed. 7 C. 284.

(2) *Date of order* :—

Where an application for addition of parties is made *within*, but the order of the Court is passed *after*, the period of limitation, the former date, and not the latter, ought to be taken into consideration for purposes of limitation as against the newly added parties. 17 B. 29.

(3) *Suit for partnership accounts—New defendant* :—

Where, in a suit for partnership accounts, a necessary party (defendant) who, being omitted, is added later on when the period of limitation against him has elapsed, the whole suit would be liable to dismissal. 14 C. 791,

1. B.—‘Substitution or addition of new defendants.’—(continued).

(4). Suit for accounts :—

Where, in a suit for accounts liable to be rendered by the original defendants *and* some others, the latter are added as parties after the expiry of limitation as against them, the whole suit for accounts will be liable to dismissal. 33 P.R. 1897.

(5) Pre-emption suit:—

(a) In a suit for pre-emption, the addition of a joint-vendee, as a party to the suit, after the period of limitation, involves the dismissal of the suit. 1 A.W.N. 153.

(b) Where, when one of the purchasers was added as a party in a suit for pre-emption, the suit was barred as against him, the whole suit was dismissed. 104 P.R. 1882.

(c) If all the representatives of a deceased vendee and persons in possession of his estate are not impleaded as parties to the suit, originally, and if any of them is brought in, afterwards, after expiry of limitation, the whole suit will be liable to dismissal. 141 P.R. 1889.

(d) Where it was found that the defendant had sold the land to a third party, who was since impleaded as a defendant, the date on which he was impleaded determined the question of limitation. 74 P.L.R. 1908.

(e) A suit to enforce a right of pre-emption with regard to the sale of a share of an undivided estate to two persons (one a major, and the other a minor) jointly, was held to be in time, both of them being made parties within the statutory period. 4 A. 145.

(6) Auction-purchaser :—

Where, in a suit by a defeated claimant, the auction-purchaser was added as a defendant when the period fixed by art. 11 had elapsed in his favor, the suit was barred. 74 P.L.R. 1901.

(7) Suit for money received by defendant for plaintiff's use :—

If, in a ———, the defendant who is alleged to have received the money is brought on the record as a defendant after the expiry of three years from such receipt, the suit as against him will be barred. 1 B. 295 (12 B.H.C.O.C. 97).

1. C.—‘Addition of parties by Court.’

(1) Applicability of section :—

(a) The section would not apply and no question of limitation would arise when the Court, of its own motion, adds a party after the expiry of the period of limitation. 27 C. 540—4 C.W.N. 459 (*dissenting from* 14 A. 524); 24 C. 640; 12 C. 642; 3 M.L.J. 176.

(b) If, on objection made by the defendants at a late stage, the Court adds fresh parties for safeguarding the rights subsisting between them and others claiming generally in the same interest, such addition, though after limitation, will not necessarily involve the dismissal of the suit. 28 B. 11—5 Bom. L.R. 618; 1 A.L.J. 543.

1. C.—'Addition of parties by Court.'—(continued).

(NOTE).—In 28 B. 11, the original plaintiff was the managing member of a joint Hindu family; the other members of the family, who were, on the objection of the defendants at a late stage, added as co-plaintiffs, were satisfied to be represented by the original plaintiff.

(2) Suit by partners :—

A suit by one only of several partners for recovery of a debt due to the firm, is not maintainable.

Even where, in such suit, the Court adds, under S. 32, C.P.C., a partner as a co-plaintiff, after the expiry of limitation for a suit against him, the whole suit must be dismissed. 14 A. 524.

1. D.—'Transposition of parties.'

(1) Transposition of parties :—

(a) The section is inapplicable to cases where the Court, of its own motion, transforms a defendant into a co-plaintiff, all the necessary parties to the suit being *properly* before it either as plaintiffs or as defendants. 17 M. 12—3 M.L.J. 176.

(b) If a defendant, not properly on the record at the date of the institution of the suit, is transformed into a co-plaintiff after the expiry of the period of limitation for the suit, the whole suit would be liable to dismissal. 19 C. 760.

(c) The change of parties as plaintiffs, in conformity with the provisions of S. 27, C.P.C., does not give rise to a question of limitation such as arises upon addition of a new person as defendant. 14 C. 400.

(d) Where one only of the executants of a deed sues for a declaration of its invalidity making the other executants co-defendants, and the latter are, after the expiry of the period of limitation for the suit, made co-plaintiffs, they will not be entitled to the declaration prayed for by the original plaintiff. 18 M. 189—4 M.L.J. 106.

(2) Legality of transposition of parties :—

It is illegal for a Court to order that certain defendants should be made plaintiffs under S. 32 C.P.C., when the effect of it would be to render the suit barred as against them. 10 M. 44 (47).

1. E.—'Mis-description of parties.'

Misdescription of parties :—

The section only applies to non-joinder, not misdescription, of parties such as that falling within the purview of S. 27 of the C.P. Code. 17 B. 418.

EXAMPLES OF MIS-DESCRIPTION OF PARTIES :—

(1) Disclosure of partners of a firm or Company :—

(a) Where a suit was brought in the name of a firm, by its manager, and, after objection by the defendant, the name of a partner was disclosed by bringing him specifically on the record, the objection on the score of limitation failed. 17 B. 418.

1. E.—‘*Mis-description of parties.*’—(continued).

EXAMPLES OF MIS-DESCRIPTION OF PARTIES :—(continued).

- (b) So, also, where a suit was brought originally against an unregistered Corporation through its manager and, on the return of the plaint for amendment, the other members of the Corporation were brought on the record specifically, though after the period of limitation. 29 P.R. 1886.
- (c) Where the suit, originally, was against a Company, and the partners of the Company were, on their own application, made parties after the period of limitation, the suit was *held* not barred. 7 A. 284—5 A.W.N. 40.

(2) Addition of right person as respondent :—

Where, through mistake, the name of a wrong person was entered as respondent in an appeal memorandum, and the name of the right person was allowed to be entered after the period of limitation, the appeal was *held* not barred. 8 A.W.N. 58.

(3) Change of cause-title :—

Where the cause-title of a suit is changed, after the period of limitation, without introducing any new plaintiff, the suit will not be barred. 18 A. 198 (F.B.)—16 A.W.N. 28 (overruling 17 A. 292).

(4) Shifting of ground of liability :—

Where the ground on which the liability of a defendant already on the record was shifted without new persons being included as defendants, the suit was *held* not barred. 15 M. 417—2 M.L.J. 119.

(5) Suit against Municipal Committee :—

Where a suit was brought against a Municipal Committee through its Secretary, and the name of the President was substituted after expiry of limitation, the suit was *held* not barred. 2 A. 296.

(6) Addition of executor :—

Where two sons of a deceased person were sued as the heirs of their deceased father and, it being found subsequently that one of them had been appointed an executor under the will of the deceased, the plaint was amended by impleading the latter, as executor, after the expiry of limitation : *held*, there was no addition of a new defendant and the suit not barred. 7 C.W.N. 575.

(7) Addition of beneficiaries :—

Where, during the pendency of a suit by an executor under a will, the beneficiaries who took possession of the estate were substituted as plaintiffs after expiry of limitation, *held* there was no addition of new plaintiffs and the suit not barred. 7 C.W.N. 817.

(8) Suit by benamidar—addition of real purchaser :—

The suit being originally laid by the *benamidar*, the subsequent addition of the real owner after the expiry of the period of limitation will not involve the dismissal of the suit, the defect being cured by S. 27, C.P. Code. 22 B. 872.

1. E.—‘*Mis-description of parties.*’—(continued).

EXAMPLES OF MIS-DESCRIPTION OF PARTIES:—(continued).

(9) Addition of nominal purchaser:—

So, also, where, the real purchaser being originally a party, the nominal purchaser is brought on the record after the period of limitation. W.R. (1864), 316.

(10) Addition of representatives of decree-holder:—

Where, in a suit to set aside a Court-sale, brought originally against the decree-holder, who brought the property to sale, and a supposed auction-purchaser, the representatives of the decree-holder-defendant and the real purchaser, who took no part in execution-proceedings, were brought on record after expiry of limitation, the suit was *held* not barred. 10 W.R. 317.

(11) Suit against guardian—Later introduction of minor:—

Suit originally laid against the mother and guardian of the defendant (a minor)
 —Minor brought in subsequently after the expiry of limitation for the suit; *held* suit barred. 37 P.R. 1889.

(12) Amendment of plaint:—

(a) Where a Court, under the mistaken impression that a co-plaintiff (already on record), who had not signed and verified the plaint, could not be considered a plaintiff at all, ordered the plaint to be amended, *held*, the date of the original presentation of the plaint, and not the date of the amendment, determined the question of limitation, there being no addition of any new party by the amendment. 17 C. 580 (P.C.).

(b) In cases of amendments of plaints without the introduction of new parties the date of the original presentation of the plaint and not that of the amendment will be the determining factor as regards limitation. 9 B. 373 (at pp. 401, 402); 2 A. 832; 3 B. 312 (at pp. 320 and 321); 11 M. L.A. 468.

But (a) a partner of a firm, suing alone in his own name, in respect of a partnership transaction, cannot, in appeal, be allowed to bring in the other partners on the record, so as to deprive the defendant of the benefit of the plea of limitation. 18 M. 33=4 M.L.J. 23.

(b) A suit, being brought against persons who had been dead and in consequence dismissed, the plaintiff, in appeal, cannot be allowed to bring on the record the representatives of the deceased defendant so as to deprive them of the plea of limitation, especially where he had not asked for an amendment in the Court of first instance. 16 M. 319.

23. In the case of a continuing breach of contract⁽¹⁾ and in the case of a continuing wrong⁽²⁾ independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

Continuing breaches and wrongs.

(Old Acts)

[In the case of a suit for the breach of a contract, where there are successive breaches, a fresh right to sue arises, and a fresh period of limitation begins to run, upon every fresh breach ;
 S. 23 of Act IX of 1871. and where the breach is a continuing breach, a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the breach continues.

Nothing in the former part of this section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due.

Illustrations.

(a) A contracts to pay an annuity to B for his life by quarterly instalments. A fails to pay any of the instalments. Here, upon every fresh failure, a fresh right to sue arises and a fresh period of limitation begins to run : and this Act may bar the remedy on the earlier breaches without affecting the remedy on the later breaches.

(b) A, a tenant, covenants with B, his landlord to keep certain buildings in repair. At every moment of the time during which the buildings continue out of repair and B retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

S. 24—Act IX of 1871. In the case of a continuing nuisance a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the nuisance continues.

Illustration.

A diverts B's water-course. At every moment of the time during which the diversion continues and B retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

Act XIV of 1859.—No corresponding provision.]

(Notes)

(Note).—This section and arts. 115 and 116, *post*, ought to be read together.

Distinction between the old and the new Acts :—

The old act gave the benefit of the section to suits for the breach of a contract in cases of *successive* breaches, as also to suits, in cases of a *continuing* breach. The present section confines the benefit only to cases of a *continuous* breach. 4 A. 493. *Compare*. 7 N.W.P.H.C. 53 ; 10 A. 85—7 A.W.N. 292 ; 8 A.W.N. 15.

1.—‘Continuing breaches of contract.’

Where there is a breach of contract and the breach has not ceased a suit for compensation for the breach will not be barred by art. 115 but will be governed by this section. 6 A. 457—4 A.W.N. 168.

INSTANCES OF BREACHES OF CONTRACT.**(1) Consent-decree—instalments :—**

The old Act was applicable to a consent-decree for payment by instalments. 24 W.R. 20.

(2) Suit for damages for non-payment of principal :—

In a ———— due under a mortgage, interest being claimed in the shape of damages, there is but one breach (viz., the non-payment of principal on the due date, and there is no question of continuing or successive breaches. To such a case art. 116 applies. 11 A. 416.

(3) Covenant for quiet possession :—

A ———— admits of a continuing breach and a suit for damages for breach of such covenant will not be barred so long as the breach continues. 2 B. 273 (292).

(4) Breach of condition in mortgage :—

The ———— that the mortgagee would pay to the mortgagor an annuity under pain of forfeiture is a continuous breach of contract giving rise to a cause of action every time the breach occurs. 7 N.W.P.H.C. 53.

(5) Performance rendered impossible :—

Though the cause of action for a suit for damages for breach of a contract arises when one of the contracting parties renders the performance thereof impossible, still the suit may be brought within three years from the expiry of the contract period, as till then there is a continuing breach of contract. 16 P.R. 1899.

(6) Suits between landlord and tenants :—

A suit by proprietors to compel occupancy tenants to reside in their village, basing their claim upon a provision in the *wajib-ul-urs*, brought after lapse of more than 12 years from the change of residence, will be barred and S. 23 has no application since it cannot be said that there has been a continuing breach of contract in this case. 180 P.R. 1883.

(7) Obligation to pay interest annually :—

An obligation to pay interest annually is of “a recurring kind” and failure to discharge the obligation does not amount to a continuing breach of contract within the meaning of this section. 28 P.R. 1897.

(8) Breach of covenant :—

The ———— in a mortgage by conditional sale by which the obligor agrees to pay to the obligee a certain amount as *malikhana* or, in default, to give over possession of certain lands, is not a continuing breach of contract within the meaning of the section. 2 A.W.N. 125.

1.—‘Continuing breaches of contract.’—(continued).**INSTANCES OF BREACHES OF CONTRACT.—(contd.)****(9) Non-payment of amount due under a bond :—**

- (a) On the non-payment of the amount due under a bond on the day appointed for payment, the breach of the contract occurs. In such a case, there is neither a ‘continuing breach’ under S. 23, nor successive breaches within the meaning of art. 115. 10 A. 85 = 7 A.W.N. 292.
- (b) In a suit on a bond, providing for payment in instalments subject to the condition that the whole amount should become due in the case of failure of any two instalments, it appeared that there was default in two instalments. The suit, being brought more than three years from the date of the defaults in the payments and there being no waiver by the plaintiffs, was held barred and dismissed. 11 B.H.C.A.C. 155.

2.—‘Continuing wrongs.’**(1) Withholding of wife :—**

A withholding of plaintiff's wife by a third party is a continuous wrong giving rise to recurring causes of action as long as the withholding continues. 11 A.W.N. 18; 16 B. 714; 16 B. 715 (Note); 14 P.L.R. 1903; 80 P.R. 1892.

(2) Refusal of wife to return to husband :—

The ——— and allow him the exercise of his conjugal rights is a continuous wrong giving rise to constantly recurring causes of action on demand and refusal. 16 B. 714; 16 B. 715 (Note).

(3) Restitution of conjugal rights :—

- (a) A suit for ——— falls within this section. 13 A. 126; 16 B. 714; 16 B. 715 (Note); *Compare*. 23 B. 307 and 25 B. 644 = 3 Bom. L.R. 371 noted just below.
- (b) A suit for restitution of conjugal rights falls under art. 35. Whether such a suit, the demand and refusal by the husband and wife respectively being made when they were of full age, would fall under S. 23? 23 B. 307.
- (c) A suit for ——— falls under art. 35 and not under this section. 25 B. 644 = 3 Bom. L.R. 371 (F.B.).

(4) Diversion of water-course :—

The ——— is a continuing injury giving rise to a cause of action from day to day as long as the diversion continues. 5 M.H.C. 6.

(5) Injury to servient tenement :—

The ——— accruing from a continued user of an easement is a continuous wrong giving rise to a continual cause of action every time the injury is caused. 7 N.W.P.H.C. 293.

(6) Construction of drain :—

The construction of a drain by defendant, on plaintiff's land, the former not having acquired an easement to drain his water on the latter's land, is a continuous wrong giving rise to a continual cause of action from day to day. 24 W.R. 97.

2.—'Continuing wrongs.—(continued).

(7) Wrongful taking possession of a well:—

The defendant's———belonging to the plaintiff is a continuous wrong. The plaintiff will be entitled to compensation for the wrongful act as long as the seizure continues, but he will be entitled only to such damages as he sustained within three years prior to suit. 6 M. 176.

(8) Obstruction to egress of rain-water:—

An obstruction caused to the immemorial egress of rain-water from plaintiff's house through a drain on the defendant's land is an instance of a continuous wrong. 6 B. 20.

(9) Obstruction to a water-course:—

An———being a continuous act of wrong, as to which the cause of action accrues *de die in diem*, a suit, complaining of such obstruction, would not be barred even though brought more than two years from the date of the obstruction. 6 C. 394 (P.C.)=7 I.A. 240=7 C.L.R. 529.

(10) Cultivation of co-sharer:—

The cultivation by one co-sharer of lands, belonging to himself and others, to the exclusion of the latter is an instance of a continuing wrong. 15 C. 214; on appeal, 18 C. 10 (P.C.)=17 I.A. 110.

(11) Obstruction by lower riparian proprietor:—

A lower riparian proprietor's obstructing the flow of drainage water from a superior riparian proprietor's land is an instance of a continuous wrong giving rise to a continual cause of action from day to day as long as the obstruction continues. 1 M. 335. See also 6 B. 20.

(12) Wrongful attachment:—

A———before judgment is a tort. If it continues for any length of time it will be a continuous tort and will be governed by this section for purposes of limitation. 6 Bom. J.R. 704. Compare 26 M. 410 noted under No. 15, *infra*.

(13) Infringement of right of way:—

The———is a continuous wrong giving rise to a cause of action *de die in diem*, notwithstanding the fact of the plaintiff's claiming a right of way under S. 26 of the Act and his basing his right on a previous decree giving him a title to the right of way. 1 C.W.N. 96.

(14) Violation of a right of ferry:—

The———is a continuous wrong, falling within the section. 18 C. 652.

(15) Attachment under the Criminal Procedure Code:—

An ——, S. 146, is not a continuing wrong, giving rise to a recurring cause of action during every moment of the continuance of the attachment. 26 M. 410.

2.—'Continuing wrongs.'—(*continued*).

(16) Tenant's holding over :—

A———adversely to the landlord, denying the right of the latter to enhance the rent and to eject in case of non-payment of enhanced rent, does not come under this section. If the landlord sues for recovery of the enhanced rent after lapse of twelve years, the suit will be barred. 21 B. 394. f

(17) Suit for continuing damage :—

In a———, resulting from the tortious act of the defendant, the plaintiff can recover only the damages accruing within the period of limitation applicable to the suit. 18 C. 91 (98).

24. In the case of a suit for compensation for an act which does

Suit for compensation for act not actionable without special damage.

not give rise to a cause of action, unless some specific injury actually results therefrom⁽¹⁾, the period of limitation shall be computed from the time when the injury results.

Illustrations.

(a) A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.

(b) A speaks and publishes of B slanderous words not actionable in themselves without special damage caused thereby. C in consequence refuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence till the refusal.

(Old Acts)

Sec. 25, Act IX of 1871. [In the case of a suit for compensation for an act lawful in itself, which becomes unlawful in case it causes damage, the period of limitation shall be computed from the time when damage accrues. •

Illustration.

A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation runs from the time of the subsidence.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—'Unless special injury actually results therefrom.'

(1) Public nuisance:—

—such as the obstruction of a public thoroughfare is actionable only at the suit of a party who has sustained special damage over and above that which he has suffered in common with the other members of the public. 10 A. 498; 64 P.R. 1901; 10 B. 390.

But, this rule does not apply to a zemindar, who or whose predecessor in title had dedicated to the public the road over his zemindari land. 10 A. 553.

(2) Obstruction to a public road:—

(a) A suit for compensation for an obstruction to a public road or for an injunction restraining the defendants from interfering with plaintiff's right to use a public road in a particular manner or for a declaration of plaintiff's right cannot be maintained unless special damage is proved. 2 B. 457: Compare 18 C. 91, which held that, when a Municipality caused subsidence of plaintiff's house by some works carried on under the authority of the Municipal Act, and plaintiff claimed damages, the plaintiff could not maintain the suit unless special damage were proved.

(b) When a gate was put up in a public street, which obstructed the exercise by the plaintiff and the public of their right to resort to, and draw water from a well, *held*, the plaintiff could not maintain the suit because he failed to allege and prove any special damage. 14 M. 177.

(3) Suit for damages for overflow of water:—

(a) If the defendant has a prescriptive right to maintain a bund, plaintiff cannot maintain a suit for damages for overflow of water on to his lands, if such overflow was caused by an act of God or *vis major*. 3 C. 776.

(b) A defendant (*zemindar*), bound to maintain tanks and store up water for purposes of irrigation, is not liable to a Railway Company for damages caused to the latter by the overflow of water from the tank, not by the reason of any negligence on the part of the defendant-zemindar but by *vis major*. 1 I.A. 364 = 15 B.L.R. 209 = 22 W.R. 279 (P.C.).

(4) Suit for damages for slander:—

(a) A ———, uttered orally and involving loss of personal position and status is maintainable without proof of consequential damage. 12 C. 109; 12 C. 424; 3 C.L.R. 181.

(b) Such a suit is maintainable for malicious or culpable slander, when the same involves a loss of reputation or mental pain in consequence of an apprehension of loss of reputation. 8 M. 175.

(c) Personal insult conveyed by abusive language is actionable *per se* without proof of special damage, by the law of British India. 10 A. 425; 1 A. L.J. 102.

But, a person in Calcutta injured by slanderous words can recover damages only when actual damage has been caused. This is owing to the introduction in Calcutta of the Common Law of England. 28 C. 452.

Computation of
time mentioned in
instruments.

25. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.⁽¹⁾

Illustrations.

- (a) A Hindu makes a promissory note bearing a native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian calendar.
- (b) A Hindu makes a bond, bearing a native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiry of one year after date computed according to the Gregorian calendar.

(Old Acts)

S. 26 of Act IX of 1871.—[Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

(1) English Calendar:—

- (a) The ———ought to be consulted in computing time for a suit or proceeding. 13 W.R. 183=4 B.L.R. Ap. 53.
- (b) Though a bond stipulates repayment on a certain date in an Indian year still the period of limitation should be calculated as if it had reference to Gregorian calendar. 6 C. 239=6 C.L.R. 553.
- (c) Where a bond bears a native date only, and is made payable after a certain time, that time is to be computed according to the Gregorian calendar. 4 B. 103.
- (d) Though a suit may be brought on a note bearing a native date, for purposes of limitation calculation must be made according to the Gregorian calendar. 6 B. 83.
- (e) A registered lease provided payment of rent on 30th Masi, Tharuna. The month Masi in the year Tharuna ended on the 29th day corresponding to 11th March 1885. *Held*, that a suit to recover the rent filed on the 12th March, 1891 was within time. 17 M. 61.

(NOTE).—In the year in question the month of Masi had only twenty-nine days and so the time for repayment extended also to the next day.

- (f) When a suit is laid on a pro-note bearing a native date and payable in a number of months, the months ought, for purposes of limitation, be calculated according to the British Calendar, *not* according to the native calendar. 5 B.H.C.A.C. 150.

(1) **English Calendar :—(continued).**

- (g) Where a suit is brought on a bond dated a certain day of the month and payable in two years, the cause of action arises on the day of the month corresponding with the day on which the bond is executed. 12 B. 617.
- (h) The period of limitation proscribed by S. 29 of Bengal Act VIII of 1869 should be computed according to the English Calendar. 4 C. 497 (following 4 B.L.R. Ap. 53; 9 B.L.R. Ap. 41; and 23 W.R. 275).
- (i) Under the Central Provinces Tenancy Act, a suit to eject a tenant must be brought within 10 weeks of the commencement of the agricultural year, (i.e.) the 1st of June. 1 C. P.L.R. 99.
- (j) When a bond bearing a native date and payable in one year is sued on, the year ought to be calculated according to the native calendar. 6 B.H.C.A.C. 136.
- (k) The period of payment stipulated in a Pro-note should, when the parties are Hindoos, be reckoned according to the native calendar. 7 B.H.C.A.C. 77.

(NOTE).—The above two decisions have now become obsolete by the enactment of Acts IX of 1871 and XV of 1877.

(2) **Month :—**

The word———in S. 32 of Act X of 1859 (Bengal) is to be computed according to the English Calendar. 10 C. 913.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

26. Where the access and use of light or air⁽¹⁾ to and for any building have been peaceably enjoyed⁽²⁾ therewith as an easement, and as of right⁽³⁾, without interruption⁽⁴⁾, and for twenty years,

*Acquisition of right to easements.

and where any way⁽⁵⁾ or watercourse, or the use of any water⁽⁶⁾, or any other easement⁽⁷⁾ (whether affirmative or negative), has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit⁽⁸⁾ wherein the claim to which such period relates is contested.

* S. 26 is repealed in Madras, the Central Provinces, Coorg, Bombay, the North-Western Provinces and Oudh; see the Indian Easements Act, 1882 (V of 1882), S. 3.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment, by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(a) A suit is brought in 1881, for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1860, to 1st January, 1880. The plaintiff is entitled to judgment.

(b) In a like suit also brought in 1881 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1858 to 1878. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(c) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit shall be dismissed.

(Old Acts)

Sec. 27 of Act IX of 1871.—[Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—‘Access and use of light or air.’

(1) Light and air—Scope of section:—

The section places light and air on the same footing. 14 C. 839.

(2) Completion of title to easement—Light and air:—

(a) Where, within the completion of twenty years’ user by plaintiff, the defendants gave to the plaintiff notice of their intention to build and did, as a matter of fact, begin their buildings, *held*, the plaintiff had not completed his prescriptive title to an easement of light and air, though the defendants’ building reached such a height as to obstruct plaintiff’s light after the lapse of twenty years. Sup. Vol. I.A. 175 (P.Q.).

1.—‘Access and use of light or air.’—(continued).

(b) Where there has been no appropriation of light and air through an aperture for the statutory period of twenty years, there cannot be any right of easement under this section. 2 B. 660.

(c) There is no such right as a right to the uninterrupted flow of south breeze. Such a right cannot be acquired by prescription. The 45° rule is not a positive rule of law but is a circumstance which the Court may take into consideration and is specially valuable when the proof of the obstruction is not definite or satisfactory. 14 C. 839.

(3) Right of action—Nature of obstruction :—

(a) To give a right of action in a case (when there is no express contract on the subject) for an interference with the access of light or air to dwelling houses by building on adjoining land, the obstruction must be such as to cause a nuisance to the house, (i. e.) such as to render the house unfit for habitation or business. 14 C. 839.

(b) In order to support an action by the plaintiff, the quantity of air which the plaintiff was getting should be so diminished as to prove a nuisance or injurious to health. 15 B.L.R. 361.

(4) Right of action—Access of light :—

In order to support an action by the plaintiff, the obstruction by the defendant must be such as to diminish the quantity of light, which the plaintiff was getting, to such an extent as to render his house unfit for comfortable habitation. 15 B.L.R. 361.

(5) Enlargement of window—Ancient lights :—

Where a person having a right to receive light from a certain window, enlarges it or opens a new window, the servient owner can obstruct the new window or the enlargement of the old only if, by the obstruction, he does not obstruct or diminish the former quantity of light. 7 C. 458.

(6) Right to injunction :—

Where a person has acquired an easement to the passage of light and air through a window in his house, he will be entitled to a mandatory injunction directing the defendant not to build so as to affect substantially the usefulness of the room in which the window is situated. 13 B. 674.

2.—‘Enjoyed.’

(1) Meaning of ‘enjoyed’ :—

(a) The word ‘enjoyed’ in this section does not mean ‘actually used.’ The use of the words ‘actual user’ in Illustration (b) to the section is inappropriate. 7 C. 132 (136).

(b) The enjoyment referred to in this section cannot be in abeyance and at the same time continue so as to give the plaintiff the special right claimed. 3 C.W.N. 610=26 C. 598.

(c) See, further, Nos. 1, 2, 3 & 5, under Heading 3, *infra*, “As an easement and as of right.”

2.—‘Enjoyed.’—(continued).

(2) Relinquishment of easement :—

- (a) The mere non-user of a mode of enjoying an easement cannot deprive a man of his right to enjoy the easement in that particular mode unless there was an intentional abandonment of that mode, giving rise to an agreement, express or implied, between the parties by which the person can be said to have relinquished it. The evidence as to relinquishment must be clear and unequivocal. 6 Bom.L.R. 287.
- (b) Where the owner of a dominant tenement, with the intention of abandoning the use of a way, creates an obstruction of a permanent nature rendering such use impossible, the way cannot be said to have been ‘openly enjoyed’ within the meaning of this section. 1 C. 422.
- (c) Mere non-user of an easement by the dominant owner, owing to the dismantled condition of his house, cannot be evidence of his abandonment of the easement. Over and above such non-user, there must be evidence of an intention on his part to abandon the easement. 38 P.R. 1886.

(3) Knowledge of servient owner :—

For the purpose of acquiring an easement (e.g.) a right of way, under this section, it is not necessary that the servient owner ought to have had knowledge of the enjoyment of the easement. 10 C. 214.

(NOTE).—In this case the difference existing in respect of acquisition of easements under this Act and that under the English Prescription Act has been pointed out.

3.—‘As an easement and as of right.’

(1) “As of right” :—

- (a) The expression——does not mean user without trespass but it means user in the *assertion* of a right. 23 W.R. 52.
- (b) In order that the enjoyment may be ‘as of right,’ there must be an adverse exercise of it as against the servient holder. 15 B.L.R. 361.

(2) As an easement :—

- A right of ownership and a right of easement are incompatible. If a person claim a site as owner, he cannot claim a right of easement of way over the same as an easement. 3 A.W.N. 66.
- So also, where the person claiming a right of easement over a site trespasses on such site, because the seizing of the two tenements by the same person has the effect of extinguishing the tenement. But if the trespass was of a short duration and the subsequent enjoyment of the right over the site is for a long time, the lengthened enjoyment of the right may give rise to a presumption of a legal origin or grant or agreement between the two owners. 2 A.W.N. 76.

(3) Light or air :—

The enjoyment of apertures admitting light and air will be “as of right,” when it is open and manifest, not furtive or invisible, and when it is not had in such a manner as to involve the admission of an obstructive right in the servient owner. The phrase “as of right” does not mean acquired through grant from the servient owner. 7 B. 522.

3.—‘As an easement and as of right.’—(continued).

(4) Right of way:—

To acquire a ——— by user there must be a peaceable and open enjoyment by a person claiming title thereto *as an easement and as of right (i.e.)* he must claim the right as one which he, as owner or occupier of certain land, possesses for the beneficial enjoyment of that land to pass over another person's land. 2 C.P.L.R. 34.

(5) Evidence:—

In order to acquire an easement under this section the enjoyment must have been by a person claiming title thereto as an easement and as of right for twenty years. Evidence of immemorial user, adduced in support of a right founded on ownership, does not, when that right is negatived, tend to establish an easement. 16 B. 592.

(6) Presumption:—

The principle is that, when a claim to a right of way is supported by evidence of user only, open user of another's land for the purposes of a road or pathway, if continued without interruption for a long time and not attributable to permission or sufferance, induces the presumption that the user was of right. 14 W.R. 124.

4.—‘Interruption.’

(1) Interruption, Meaning of:—

The term ‘*interruption*’ means an obstruction or prevention of the user of the easement by some person acting adversely to the persons who claim it. The expression is altogether inapplicable to any voluntary discontinuance of the user by the claimant himself. 1 C. 422 (429).

(2) Temporary interruption:—

A ———, such as during the rainy season, cannot affect a right of user. 22 W.R. 340.

(3) Discontinuance of right:—

In determining whether a dominant owner has abandoned his right to an easement, the fact of his house being in a dismantled condition for a long time will be an important factor to show either that he abandoned the intention to rebuild or gave the servient owner a reasonable cause for believing that he had so done. 38 P.R. 1886.

(4) Acquiescence:—

Acquiescence in the sense of mere submission to the interruption of the enjoyment does not destroy or impair an easement. To be effectual for that purpose, it must be attributable to an intention on the part of the owner to abandon the benefit before enjoyed. 5 M.H.C. 6.

5.—‘Way.’

(1) Public road:—

In order to establish that a road is a public road, it is enough to show that acts of user, by the public, of such a character as to warrant the inference that the owner intended to make over to the public the right to use the land as a public highway, were acquiesced in by the owner. 6 C.L.R. 282.

§.—'Way.'—(continued).

(2) **Right of way:—**

- (a) To make a right of user absolute, the claimant ought to prove twenty years of peaceable and open enjoyment without interruption in cases of———. 20 W.R. 288.
- (b) A general right of way includes a right to carry marriage and funeral processions. 20 W.R. 293.
- (c) A person, who has a———, cannot claim anything more than that the reasonable exercise of his right shall not be obstructed. 1 O.L.R. 425.
- (d) A right of user over a pathway may be established notwithstanding that the path runs over waste land. 22 W.R. 340.

(3) **Rights of servient owner:—**

- (a) In the case of a right of way, the servient owner is not disentitled to create a new right of way on his land or substitute a new, for an old, way; but, in doing so, he cannot render the dominant owner's right of way less easy than it had been hitherto. 22 P.R. 1888.
- (b) The owner of a piece of waste land does not, by merely allowing his neighbours' cattle to stray thereon, on their way to pasturo, or by allowing men and women to walk over the same for a number of years, create an easement in favor of the owners of the cattle or in favor of the men and women so walking over, because the user cannot be continuous or ancient. 8 W.R. 269.
- (c) No length of time can give a party such a right as destroys all the ordinary uses of the servient tenement—(e.g.) a straggling right to the promiscuous use of a whole property for the purpose of driving cattle over it. 15 W.R. 295.

6.—'Water-course or the use of any water.'

(1) **Artificial channel:—**

A right of easement can be acquired even in respect of an artificial channel and such right can be enforced by a lessee from Government as against another lessee of a later date if the easement had existed at the date of the former lease. 2 M. 46.

(2) **Surplus water of tank:—**

- (a) A right of easement may be acquired in the surplus water of a tank flowing through a defined channel whether natural or artificial. 7 M. 530.
- (b) The user of water of a tank drawn for purposes of irrigation for over twenty years gives the owner of the land irrigated a right of easement, though during the period, the modes of drawing the water have differed. The owner may sue even if his tenant is in possession. 8 C.W.N. 158.

(3) **Right to use of water—Natural streams:—**

- (a) Where a natural stream flows through the lands of several owners, all such owners are entitled to a reasonable use of the water. In the absence of evidence as to the exact share enjoyed, the presumption is that they are equal. 49 P.R. 1886.

6.—‘Water-course or the use of any water.’—(continued).

- (b) A water course, which has its origin in a spring, the water from which first falls into a pit, percolates underground and then flows underground for some short distance in a natural and known course until it appears again and flows on the surface, is a natural stream.

An upper riparian proprietor cannot, by putting up a dam at a point in the stream where his lands abut on it, use the water so as to interfere with the rights of the lower riparian proprietors. In the absence of any right acquired by prescription or grant, he can, as an ordinary riparian proprietor, divert the water for the purposes of irrigation, without violating the rights of, and inflicting material injury upon, other riparian proprietors. 6 Bom. L.R. 291.

(4) Riparian owner :—

A———may acquire under this section an easement to the use of water of a natural stream in derogation of the rights of adjacent riparian owners above, or below the stream. 35 P.R. 1895.

(5) Riparian rights—Right to raise bund :—

Where the defendant interferes with the erection by plaintiff, a riparian owner, a bund on his own land, which has the effect of throwing upon the land of the defendant more water than has customarily flowed on to it and of thus increasing the damage to which he has hitherto been subject, the plaintiff will not be entitled to an injunction restraining the defendant from interfering with the erection of the bund. 14 M.L.J. 162.

7.—‘Any other easement.’

Easement :—

- (a) The word———as used in the section has a much wider meaning than it bears in the English Law, for it includes besides easements appurtenant and easements in gross, what are known as profits *a prendre* (whether appurtenant or gross).

The words ‘any other easement’ in this section include profits *a prendre*. 8 C.W.N. 425—31 C. 508 (P.C.)—see also cases noted under the heading 3.—“Easements,” at p. 536, *supra*.

- (b) As for easements that can be acquired otherwise than under this section, see cases noted under heading No. 9, *infra*.

8.—‘Period ending within two years.....suit.’

(1) Point to be proved :—

- (a) In order to establish a right of way, the plaintiff cannot succeed merely by proving twenty years’ user. He must show also that such user ended only within two years before suit. 23 W.R. 401.
- (b) At whatever time the suit is brought, the enjoyment must be found to have continued till within two years of that time, and if that cannot be found, the claim should fail. 3 C.W.N. 610—26 C. 598.

8.—‘Period ending within two years.....suit.’—(continued).

- (c) A suit to establish a claim to an easement, based on continuous user for 20 years, must be brought within two years from the end of the period of twenty years. 24 W.R. 295.
- (d) No rule can be laid down as to what would, or would not, constitute a continuance of the enjoyment as of right when there was no exercise of it for any given period: this depends upon the circumstances of each case and the nature of the right claimed. 26 C. 593—3 C.W.N. 610.

(2) Actual user not necessary :—

Notwithstanding ill: (b), *actual user* within two years previous to the institution of the suit is not necessary, in order that the right claimed may be acquired under the section. 7 C. 132—8 C.L.R. 281.

(3) Evidence :—

Where the date of interruption of an easement has to be proved for purpose of limitation under this section, the mention thereof in a petition presented to a Criminal Court cannot be used in evidence. 6 C.W.N. 31.

9.—Acquisition of easements otherwise than under the section.

(1) Acquisition of easements otherwise than under the section :—

- (a) This section (26) being neither prohibitory nor exhaustive, does not exclude, or interfere with the acquisition of, easements otherwise than under it. There are several rights, in the nature of easements, which can be acquired and enjoyed independently of the aid of this section. The section does not prevent proof of acquisition of such rights or of the title on which they are based being let in 5 C. 394—7 I.A. 240—7 C.L.R. 529 (P.C.). 4 C.P.L.R. 16.
- (b) This section is not exhaustive of the mode in which an easement or analogous right can be acquired. There are several other modes, (independent of those mentioned in the section) in which such a right can be acquired. In such cases, even if the obstruction with the plaintiff's rights took place more than two years before suit, the suit will not be barred; (e.g.), the right of the inhabitants of a *Mohalla*, acquired by long user, to use a well and *Chanbulra*. 9 A.W.N. 133.

(2) Issues :—

In a suit to establish an easement, the two issues that ought to be set down for trial are :—

- (1) Whether the easement in question was enjoyed by the plaintiff peaceably openly and as of right within two years before suit or, if he could not succeed in proving this, (2) whether there is evidence of user of such a character as to justify the presumption of grant or other legal origin, independent of §. 26 of the Act. 6 C. 812.

9.—'Acquisition of easements otherwise than under the section.'—(contd)

(8) Artificial water-course:—

The right to water flowing to a man's land through an artificial water-course, constructed on a neighbour's land, must rest on some grant or arrangement proved or presumed, from or with the owner of the land from which the water is brought or on some other legal origin. Such a right may be presumed from the time, manner and circumstances under which the easement is enjoyed. 4 C. 633—6 I.A. 88 (P.C.).

EXAMPLES OF EASEMENTS OTHER THAN THOSE UNDER THE SECTION :—

(4) Right of way :—

(a) A———may be created either by grant or by immemorial custom or by necessity; and a party seeking to establish such right ought to prove the existence thereof and its uninterrupted enjoyment. 14 W.R. 199.

(b) A party, who claims the re-opening of a way under a contract, is not required by this section to prove user for twenty years. 23 W.R. 290.

(5) Acquisition of easements by grant:—

(a) On the grant by the owner of a tenement of a part of the tenement as then used and enjoyed, the grantee of the part will acquire all the easements necessary to the reasonable enjoyment of the tenement granted. 60 P.R. 1888.

(b) Where a person grants to another certain land, surrounded on all sides by his own, for building purposes, there is an implied grant to erect a privy in it and a way of necessity for the sweeper to have access to the privy, when built; and it is immaterial that no privy was built there for a very long time. 16 B. 552.

(c) Where a mortgage deed granted to the mortgagee the use of certain way and a privy in the mortgagor's other lands, the purchaser of the mortgaged property who has resumed the mortgage, will be entitled to the way and privy as against the purchaser of the mortgagor's other lands in which the right was granted. 18 B. 382.

(6) Right of way—Implied grant:—

(a) Where two tenements originally belonged to the same owner, and, while the unity of possession continued, a path was constructed by the owner; and on the separation of the tenements, the persons becoming entitled to one of the tenements continue to use that path, there is a presumption that the right to use the path passed with the tenement. 10 C. L.R. 577—8 C. 956.

(b) Implication of a grant of easement upon the severance of a tenement may extend to a "way," but that is so only where there has been some permanence in the adaptation of the tenement from which continuity could be inferred. 26 C. 311.

(7) Public way—Dedication :—

(a) The right of the public to pass over a public road is not in the nature of an easement, properly so called, and is not acquired by prescription under this section.

9.—'Acquisition of easements otherwise than under the section.'—(contd).

EXAMPLES OF EASEMENTS OTHER THAN THOSE UNDER THE SECTION :—(ctd).

The user of a road by the public for a sufficiently long time, though less than 20 years, is, apart from this section, sufficient to raise a presumption of the owner's dedication to the public. This presumption, however, can be rebutted by evidence of intention, on the owner's part, that the public should only have a permissive user. 62 P.R. 1898.

(8) Right of way—Easement of necessity :—

- (a) Where, when two adjoining compounds belonged to one individual, the resident of one was using a way over the compound of the other, for access to a well, but, subsequently, the first compound being purchased by the plaintiff and the second by the defendant, and the latter obstructed the former from using the way and the plaintiff sued for a declaration of his right, *held* the plaintiff was not entitled to any right of way over defendant's land either as an easement of necessity or otherwise. 15 A. 270.

(NOTE).—In this case the plaintiff failed to produce his title deed and show, therefrom, that any right was acquired by him thereunder.

Family dwelling-house—Partition—Easement of necessity :—

- (a) Upon partition of joint property in Calcutta by mutual conveyances whether under the direction of a Court of law or otherwise, it is implied that the parties take their respective shares with easements of light and air, as between themselves, in accordance with the existing state of the premises. 14 C. 797.
- (b) Where property held jointly is, subsequently, divided, one portion will be entitled, as against the other, to all easements that are necessary for the enjoyment of the portion or that are apparent and continuous and necessary for enjoying the share as it was enjoyed when the partition took place. 14 B. 452.
- (c) When a right of way is proved to have existed for a particular purpose for more than twenty years, the Court is not bound to confine the right to a particular number of times in the year but may construe the same as exercisable at all convenient times for the purpose. 9 C. 773—13 C.L. R. 146.

(10) Right of privacy :—

- (a) A customary right of privacy exists in India and in the North West Provinces under certain conditions. A substantial interference with such right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement, affords such owner a good cause of action. 10 A. 358.
- (b) The———prevailing in the North West Provinces is a right attaching to property and not dependant on the religion of the owner. 16 A. 69.
- (c) As to the nature and quality of proof to establish a———, see 19 P.R. 1882.
- (d) Where a———is claimed, it must be shown that the right actually exists and is enjoyed in respect of the specific premises on behalf of which it is claimed. No such right can exist in respect of a *baithak* or sitting room appropriated to males. 19 A.W.N. 159.

9.—‘Acquisition of easements otherwise than under the section.’—(contd.).

EXAMPLES OF EASEMENTS OTHER THAN THOSE UNDER THE SECTION :—(contd.).

(e) But invasion of privacy is not actionable in the Madras Presidency because there is no such thing there, as a right of privacy. 3 M.H.C. 141; 18 M. 163; or in Bombay—5 B.L.R. 676; 9 B.H.C. 266.

(f) Compare 5 B.H.C. 42 and 6 B.H.C. 143, which recognize the existence of such a right in Guzerat, by reason of a special custom obtaining there.

(11) Right of way for boats :—

(a) In the case of a ———— during the rainy season, the plaintiffs proved their enjoyment of the way during particular seasons of the year for more than twenty years till a little more than two years before suit. Held that, in such a case, actual user of the way, *within two years* before suit was unnecessary and the suit was not barred. 7 C. 132=8 C.L.R. 281—(NOTE) see same case noted under Heading No. (2) ‘Enjoyed.’

(b) But see 26 C. 593=3 C.W.N. 610 :—“Conceding that the plaintiffs need not prove an actual user of the way up till the end of the statutory period, there must, when there is no user for a long time, be circumstances from which the Court can infer the continuance of an enjoyment as of right over the whole statutory period, and the cessation of the user must be at least consistent with such continuance.”

(c) In the case of a ———— during the rainy season, the way being wholly in another man’s land, the dominant owner cannot complain of the servient owner’s narrowing the channel, so long as the latter, by so doing, does not prevent the former from passing and re-passing as conveniently as he has always been accustomed to do. 7 C. 145=8 C.L.R. 375.

(12) Right of ferry :—

(a) The right of establishing a private ferry and levying tolls is recognized in British India. Twenty years is the shortest period within which such a right can be established by user. 6 C. 608 (F.B.).

(b) Any private person in the mofussil of the Bengal Presidency may establish a ferry and levy tolls from those who use it; in order to acquire the exclusive right, he must prove a user of not less than twenty years. 7 C.L.R. 504.

(c) No person can claim a monopoly of a right of ferry by prescription or by any other means than a grant from the Crown. Part IV of the Limitation Act is inapplicable to such a case. 18 C. 652.

(13) Right of fishery :—

(a) A prescriptive ———— is an ‘easement’ under the Act. (Vide definition of the term in S. 3).

Such a right may be claimed by any one who can prove a “user” for the prescribed period (i.e.) that he has, as of right, claimed and enjoyed it uninterruptedly for twenty years, though he cannot prove enjoyment or possession of any dominant tenement. 5 C. 945=6 C.L.R. 269.

But compare 3 C. 276=1 C.L.R. 592—a case under the old Act—which did not contain a definition of the term ‘Easement.’

9.—‘*Acquisition of easements otherwise than under the section.*’—(contd).

EXAMPLES OF EASEMENTS OTHER THAN THOSE UNDER THE SECTION:—(*ctd.*)

(b) No prescriptive right of fishery can be acquired by virtue of a custom which is unreasonable. 9 C. 698=12 C.L.R. 382.

(c) To a suit by a Zemindar for restraining the tenants of a village from fishing in a tank belonging to the Zemindar, the fact that some of the defendant-tenants had, on many occasions extending over more than twelve years, carried away fish from the tank, is no sufficient answer. Such acts could amount, at the most, to trespasses. Mere acts of trespass and misappropriation would not constitute actual *dispossession* of the Zemindar-plaintiff. 9 C. 698=12 C.L.R. 382.

(d) The right to fish in tidal waters may be acquired by private persons, to the detriment of the right of the public, by grant or prescription. 8 M. 467.

(14) Right of pasturage:—

A tenant may have a right of pasturage on his landlord's lands by immemorial user. In such a case of immemorial user the presumption is that the right had a legal origin. 8 C.W.N. 425 (P.C.)=31 C. 503.

(NOTE).—Where such a right is established, the tenant ought to use the servitude in such a manner as not to prevent the landlord from cultivating or executing improvements on his land. *Ibid.*

(15) Claim to right by custom:—

The claim of plaintiffs to go on a certain land, during some days at one period of the year, and perform some ceremonies there, is not a claim to an easement, but a claim to a right by custom. Such a claim, therefore, is not an easement falling within this section, and a suit for restraining the defendant from using the land at another period of the year will not lie. 6 A. 497=A.W.N. (1884), p. 186.

But see 16 A. 178, which holds that a right to place *tazias* on a certain plot of land during the Moharram is a right of the nature of customary easements coming within S. 18 of the Easements Act (V of 1882) and may be acquired as such by prescription.

(16) Customary right—Right to stack grain in front of shop:—

A right to stack grain in front of his shop may be acquired by a grain-dealer by custom, such a custom being neither unreasonable nor uncertain nor opposed to public policy. 7 P.R. 1899.

(17) Right to cut brushwood:—

A right of the inhabitants of a village in the Amballa District in the Punjab to cut brushwood for the repair of their water-course from the lands of strangers in the neighbourhood is a customary right such a right being profits *a prendre*. 31 P.R. 1882.

(18) Right to dry tobacco on another's ground:—

Snuff grinders and mill-owners may acquire a ————— by more than twenty years' user as of right. 14 P.R. 1897.

9.—*'Acquisition of easements otherwise than under the section.'*—(contd.)

EXAMPLES OF EASEMENTS OTHER THAN THOSE UNDER THE SECTION:—(contd.).

19) **Right of support:—**

(a) A—for buildings from the adjacent and subjacent soil and from adjoining buildings arises by implied grant, in the absence of express stipulation, in every case where a grant of land for building purposes is made by the owner of the adjoining house. 60 P.R. 1888.

(b) Where a person built a house on his own land without touching the house of another, he cannot acquire any easement in that other's premises. 13 B. 79.

(20) **Party-wall:—**

Where one of the owners of a party wall in constructing his house inserts beams and pillars into his side of the wall, the other owner has a right to complain only if the alleged acts amount to his ouster or to a destruction of the party wall. 6 Bom. L.R. 682.

(21) **Projection of beam—Construction overhanging the projection:—**

Where a person acquires the right to project a beam upon another's land, he has no right to prevent that other from rearing a construction in his own land which overhangs the beam. 6 Bom. L.R. 366.

(22) **Discharge of surplus water:—**

Where a party has exercised the right of discharging the surplus water from his tank over the land of another, openly and uninterruptedly, year after year, for more than twenty years, a presumption arises that he has obtained the easement as of right. 24 W.R. 228.

(23) **Right to drainage of surplus water:—**

(a) The right of the owner of high lands to drain off their surplus surface water, through the adjacent lower grounds, is an incident of ownership of land in this country. 12 C. 323; 7 W.R. 498; 20 W.R. 287; 1 M. 335; W.R. (F.B.) 25.

(b) A right to the uninterrupted flow of water along a defined channel over the lands of others may exist independently of the provisions of this section.

(c) Where such a right is claimed as a hereditary and customary right and evidence is given of long user, there may be a presumption of a grant of the easement, and the Court ought not to dismiss a suit because there is no proof of user within two years before suit. 5 M. 226.

(d) A—is an apparent and continuous easement, the doctrine as to which is applicable in India; the right of access for the purpose of supervision of the right to discharge water and drainage is a necessary adjunct to the right of drainage. 49 P.R. 1900.

(e) Where it is established that, for a long series of years, the water from the plaintiff's land was escaping in a particular direction and by certain passages across the defendant's land, the defendant could not do anything which would interfere with the plaintiff's right in this respect. 8 C. 468.

(f) A lower riparian proprietor cannot obstruct the right of a superior riparian proprietor to have the drainage water from lands of the latter permitted to flow off in the usual course, unless he had acquired an easement to do it. 1 M. 395.

B.—‘Acquisition of easements otherwise than under the section.’—(contd).

EXAMPLES OF EASEMENTS OTHER THAN THOSE UNDER THE SECTION:—(ctd).

(24) Right to discharge rain-water:—

(a) A right to compel the defendant to receive upon the roof of his house rain water flowing from the roof of the plaintiff's house can be acquired only by contract or prescription. 3 B. 174. *

(b) Where the plaintiff had, from time immemorial, enjoyed the right of discharging his rain-water, through defendant's land, until an obstruction was caused by the defendant more than two years prior to suit, it was held, the plaintiff acquired a right by immemorial user independently of this section and that he was entitled to succeed. 6 B. 20 [following 6 C. 394 (P.G.).]

(25) Customary right—Right to flow of river water:—

An easement which is not a customary right need not be reasonable.

An easement may be established of the right to cause river water to flow across the servient tenement on to the dominant tenement for purposes of irrigation, by means of embankments erected on the dominant tenement. In such cases, it is enough if it is proved that the right has been exercised for the statutory period during seasons of drought when it could be taken advantage of. 30 C. 1077.

(26) Right of land-holders in South Canara is not an easement. 16 M. 304.

(27) Right acquired before this Act:—

There is nothing in this Act to prevent a person from suing to establish a right to an easement acquired under the law in force prior to the enactment thereof. Eighteen years' enjoyment before suit was held sufficient. 5 M. 258.

(GENERAL)

(1) Scope of section:—

The section does not apply to a suit to restrain one co-sharer in a joint property from appropriating to his own particular use a portion of such property without the consent of the other co-sharers. 22 W.R. 286.

(2) Applicability of section:—

This section applies only to a case, where the suit is brought to establish an easement. The present suit being one to remove a dam across a natural stream, held the section was inapplicable. 2 U.B.R. 642 (1892-96.)

(3) Reservation in grant:—

Where the owner of a tenement granting a portion of it to another wishes to retain any right over it, he must retain such right expressly; but he cannot retain a right of way or other easements of necessity, without which the enjoyment of the tenement granted cannot be had. 60 P. R. 1888.

(4) Right to easement—Court-sale:—

The rule that the right to an easement passes with the property by a voluntary sale applies also where the property is sold by Court in execution of a decree. 22 W.R. 552.

(GENERAL).—(continued).

(5) Change in the mode of enjoyment of servitude :—

The rule that a servitude gained for one purpose cannot be used for another is not applicable where the burden imposed on the servient tenement is not aggravated. Nor would a change disentitle the dominant owner to take into account the previous user. 13 C. 136—13 I.A. 77 (P.C.)

(6) Accrual of cause of action :—

The servient owner may sue for damages accruing to him from the continuous use of an easement by the dominant owner, every time damages accrue to him, provided he puts his cause of action in suit within twelve years of its accrual. 7 N.W.P.H.C. 293.

(7) Acquisition of rights as against the Crown :—

The provisions of this section do not apply to the Crown, as otherwise, it would be to its prejudice. A right of free pasturage on a particular land cannot be acquired as against the Crown. 14 B. 213.

(8) Revocation of license :—

A license to use the land of another, unless coupled with a grant, is revocable at the will of the licensor, subject to the right of the licensee to damages, if revoked contrary to the terms of any express or implied contract. 16 C. 640.

(9) Prescriptive right to injure :—

No—another, can be acquired :—(e.g.) a right to throw the contents of crucibles are made, in a neighbour's tank, in which a right may have been exercised. 20 W.B. 357.

(10) Penetration of roots—overhanging of branches :—

(a) No prescriptive right can be acquired to compel a man to submit to the penetration of roots of a tree planted on his neighbour's soil or to submit to the overhanging of trees planted on the neighbour's land. 8 C.W.N. 710.

(b) The prescriptive right to have branches of one's trees overhanging another's land does not carry with it the right to go on that other's land to collect fruits from the overhanging branches. 17 B. 745.

(11) Manufacture of cloths :—

Where a plaintiff carried on the business of manufacturing a particular kind of cloth in a certain house for over 20 years and the defendant raised a building in the neighbourhood in such a manner as to render the house useless to the plaintiff for the carrying on of his usual business, held he was entitled to an injunction. 17. A.W.N. 43.

(12) Overhanging of roof :—

Where the roof of one person overhangs the land of another for more than twenty years, such enjoyment thereof would, if considered as possession, extinguish the right of that other to sue and, if considered as mere easement, would vest in the former a proprietary right to the space occupied by the overhanging roof. 3 B. 174.

(To be continued).

27. Provided that, when any land or water upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Exclusion in favor of reversioner of servient tenement.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a Hindu widow, had a life-interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

(Old Acts.)

S. 28 of Act IX of 1.

Same as above, except that the parenthesis, '(other than the access and use of light and air)' after the word 'easement' in the second line has now been repealed.

Act XIV of 1859.

No corresponding provision.

28. At the determination of the period hereby limited⁽¹⁾ to any person for instituting a suit for possession⁽²⁾ of any property,⁽³⁾ his right to such property shall be extinguished.⁽⁴⁾

Extinguishment of right to property.

(Old Acts.)

S. 29, Act IX of 1.

At the determination of the period hereby limited to any person for institution of a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished.

Act XIV of 1859.

No corresponding provision.

(Notes)

Scope of Section :—

1. The section is limited in its operation to cases in which the bar of limitation applies to suits for possession of property. 26 M. 410.
2. This section has no application to persons in possession, who have no occasion to sue for recovery of possession. 17 M. 255.
3. The section does not apply to the case of defendants who rely on an actual possession which has never been disturbed. 14 B. 222.

Effect of Section :—

The effect of the section is not merely to bar the remedy, but also to extinguish the title of the rightful owner, after twelve years of a possession adverse to him. 1 B. 592.

1.—‘Hereby limited.’**Hereditary office and emoluments :—**

The Limitation Act does not prescribe any period of limitation for suits under Madras Regulation VI of 1831; and no title by prescription can be acquired to a hereditary office or its emoluments falling within the Regulation. 21 M. 134 = 7 M.L.J. 196.

2.—‘Possession.’**Possession, meaning of :—**

The word ‘possession’ embraces both physical possession and possession in law. 6 C.W.N. 601.

3.—‘Of any property.’**(1) Right of pre-emption :—**

The section applies only to suits for possession of property. In a suit by a vendee for possession of the property sold, the defendant may set up his right to pre-emption as a defence, notwithstanding the fact that he failed to bring a suit asserting his right of pre-emption within the period of limitation. 18 M. 490; See also 20 M. 305.

(2) Object of section :—

The section extends the doctrine that twelve years’ adverse possession of land not only bars the remedy of the rightful owner, but extinguishes his right to property other than land.

Quere.—Per GARTH C.J.—Whether the principle would apply to debts? 4 C. 283 = 3 C.L.R. 336.

(3) Trees, suit for :—

Adverse possession of trees for upwards of twelve years would extinguish the title of the true owner and confer a good title on the wrongful possessor. 3 A. 435 = 1 A.W.N. 9.

(4) Debt—Bar of remedy—Extinction of title :—

(a) In respect of debts and decree-debts, this Act and Act IX of 1871 merely bar the remedy, but they do not extinguish the right. 5 C. 897 = 6 C.L.R. 489; 6 C. 340 = 7 C.L.R. 121; 3 P.R. 1887 (see No. b. *infra*);

On the above point, see also cases noted under Nos. 5, 6, 7, and 8(a) under the heading, **Effect of repeal of enactments**, at pp. 581 & 582, *supra*.

3.—'Of any property.'—(continued).

- (b) The section does not extend to the case of a debt, much less to a judgment-debt. A mortgage-debt, which has merged in a decree, will not be extinguished by the fact that the decree is barred by limitation and has become unenforceable in execution. A usufructuary mortgagee, who has obtained a decree, will be entitled to remain in possession until his debt is paid off, notwithstanding the fact that the decree is barred. 3 P.R. 1887.

As for the application of the principles of this section to suits for maintenance and debts, see notes Nos. 4 to 8 at pp. 531 and 532, *supra*.

4.—'Right to such property shall be extinguished.'

Acquisition of prescriptive titles before Act IX of 1871:—

1. Even before the passing of Acts IX of 1871 and XV of 1877, a right not sued for, within the period of limitation prescribed for enforcing it, would be extinguished, and could not be revived by the passing of any subsequent Act, notwithstanding the absence, in the Limitation Act then in force, of any provision similar to S. 28 of the present Act. 31 C. 314; 1 M.I.A. 345 = 7 W.R. 21 (P.C.); 13 B.L.R. 177 = 20 W.R. 375 (P.C.); 27 C. 103 = 27 J.A. 103 (P.C.).

2. See also noted below. See 1 M.H.C. 85, which ruled that the Limitation as to realty barred the remedy but did not extinguish the right.

3. Under Act XIV of 1859, at the expiration of the time limited for a suit, the remedy only was barred, but the title was not extinguished. If, therefore, the person, who omitted to sue within the time limited, re-acquired possession, such possession would refer to the subsisting title, and a third party, who disputed such person's title, would have to prove his own title as against such person independently of any help from the statute of limitation. 15 B. 299.

General.

Extinguishment of title:—

1. Possession of land by a wrong-doer for twelve years not only extinguishes the title of the rightful owner of such land, but also confers a good title on the wrong-doer. 3 A. 435; 3 C. 224.
2. Such title may be transferred to a third person whilst it is in the course of acquisition and before it has been perfected by possession for the statutory period. 3 C. 224; 1 A.W.N. 9.
3. Adverse possession for more than twelve years by one claiming land as full owner not only extinguishes the title of the true owner to the land so held and debars him from suing for its recovery, but creates by negation in the occupant which he can actively assert, if nobody, for more possession, even against the true owner. 21 B. 509.
4. Under this section, the right of a person to property is extinguished of the determination of the period limited for bringing a suit against it. 24 M. 387 (1906) = 5 C.W.N. 545 (P.C.).

4.—'Right to such property shall be extinguished.'—(continued).

5. A person holding a title to real property, which he cannot reduce into possession without bringing a suit, would stand barred from the remedy if he does not come in Court within the limitation period. 7 A.W.N. 92.
6. Adverse possession for more than twelve years not only bars the remedy but also extinguishes the title of the real owner in favor of the possessor. The principle applies equally to cases where the possession still continues and to those where it has terminated. 16 P.R. 1886.

(Special cases).

(1) Equity of redemption :—

An equity of redemption may be extinguished by adverse possession—(e.g.), when a stranger receives rent from the usufructuary mortgagee in possession of the land mortgaged—for more than twelve years as against the person entitled to redeem the mortgage. 6 C.W.N. 601.

(2) Mortgagee's rights :—

Though a mortgagee cannot, in consequence of lapse of time proscribed by art. 135, sue for possession and the only suit open to him is one for foreclosure under art. 147, still, as such a suit would include a prayer for possession, if the mortgage-debt is not paid on some day to be named by the Court, this is sufficient to prevent the operation of S. 28 to extinguish the rights of the mortgagee. 83 P.R. 1883.

(3) Right to graze :—

Where a person who had a right to graze abstained for more than 12 years from the exercise of such a right, the fact of such abstention alone cannot extinguish the right; but, if he had claimed such a right and had been refused by the other party, the right would be extinguished on the expiration of 12 years from the date of such refusal. 106 P.R. 1883. Cf. 106 P.R. 1883, Note.

(4) Right of pre-emption :—

In Malabar, the right of pre-emption of an *ottu* mortgagee in possession is not extinguished under section 28, and the mortgagee can assert his right irrespective of article 10, because section 214, Civil Procedure Code, is inapplicable to the case, the mortgagee being in possession. 20 M. 305: See also 13 M. 490.

Right to religious office and endowments :—

A right to a religious office and its endowments may be acquired by adverse possession for more than twelve years. Although the office and the endowments attached thereto may be indivisible, still a divisible right to a portion may be acquired, and the indivisible right may be lost by adverse possession. 21 M. 278 (287).

4.—‘Right to such property shall be extinguished.’—(continued).**(6) Trustees—Extinction of right of management :—**

If, of two branches of a Hindu family owning the right of management of a temple, the members of the junior branch have, for a period of more than 12 years, discontinued possession of the immoveable properties belonging to the temple, as also performance of the duties of the office of trustee, and the members of the senior branch have, during such period, been continuously in possession of the properties and doing the duties of the office, the right of the former as a body will be extinguished in favor of the members of the senior branch as a body. 27 M. 192 (197) = 13 M. L.J. 341.

(7) Suit claiming office of Dharmakarta :—

A ——— will be barred if the office had been held by the defendant adversely to the plaintiff for more than twelve years, the right being extinguished under this section. 1 M. 343 (348).

(8) Right to shebaitship :—

A person may acquire a ——— by more than twelve years' adverse possession as shebait, even though his nomination to the office may be invalid. 19 C. 776.

(9) Claim to office and claim for property :—

In regard to the application of article 124 and of section 28, there is no distinction between the claim to the office and that for the property. If there were, article 144 will apply to the claim for the property. 23 M. 271 (P.C.).

(10) Extinction of title to office—Extinction of title to land :—

If title to an office is extinguished by lapse of time for recovery of the same, the title to recover lands attached to the office, as a source of endowment, for the services of the holders, will also be extinguished. 6 M.H. C. 301.

(11) Claim to separate estate by a member of joint family :—

A suit by a member of a Joint Hindu family claiming separate title to a property, which was in the possession of the joint estate, is governed by the twelve years' limitation provided either by the art. 142 or by art. 144, and his right will be extinguished under section 28 after that period. 24 M. 387 (P.C.) = 5 C.W.N. 545.

(12) Recusant proprietor claiming *Malikhana* :—

The rule of law that a person entitled to an interest in immoveable property loses not only the remedy, but also his title, by being out of possession for twelve years, applies to the case of a recusant proprietor claiming *malikhana*. 13 W.R. 465.

(13) Resumption or assessment of service land :—

Where, in cases of land granted originally as remuneration for services to be rendered, the services cease and the land is in possession of somebody, other than the grantee and not claiming under the grantee, for more than twelve years without payment of any rent, the right of the grantor to assess rent or resume the land will become extinguished 1 B. 596.

4.—‘Right to such property shall be extinguished.’—(continued).

(14) Execution—Delivery of possession—Extinction of stranger's rights:—

If, in execution of a decree, possession is delivered to the decree-holder in spite of the resistance and obstruction of a third party, and such third party does not regain possession or bring a suit for possession within the statutory period, his right to the property will be extinguished in favor of the decree-holder. 27 M. 262.

(15) Vendor's lien:—

Notwithstanding the fact of the expiration of the period of limitation for a suit by a vendor for enforcing his lien for unpaid purchase-money, his lien will not be extinguished by his omission to sue within the statutory period. He may, if he is in possession of the property sold, successfully resist a suit by the vendee to recover possession of the property sold, on the ground of non-payment of the purchase-money, and the Court may pass a decree for possession conditioned upon the payment of the purchase-money. 27 M. 28.

(16) Possession of mirasdar on inam estates:—

A *mirasdar* on *inam* estates in Bombay, being only “a tenant at quit-rent, or at a reasonable rent not subject to ejectment so long as he pays it,” his possession cannot be adverse to the landlord until there is an assertion of right in him as perpetual tenant. 18 B 507

(17) Extinction of widow's right—Reversioner:—

The extinction of a right by the effect of limitation running against a widow has no application to a reversioner, who does not derive his right from or through the widow but derives it through her husband. 23 B. 725 = 1 Bom. L.R. 307 (P.C.).

(18) Suit for declaration of *lakhiraj* title:—

A person, suing for a declaration of *lakhiraj* title to lands, need not prove that he held the lands rent-free from before the permanent settlement. It is enough for him to show that, when his suit is brought, the defendant's right to resumption of, or assessment of rent on, the lands, was barred by time. 5 C. 949 = 6 C.L.R. 260.

(19) Attachment under the Criminal Procedure Code, S. 146:—

The right of the true owner of lands cannot be extinguished, however long an attachment under S. 146, Criminal Procedure Code, may continue: nor can such lands be forfeited to Government. 26 M. 410.

(20) Omission to set aside order under S. 13, Act III of 1876:—

(a) Omission on the part of a person, against whom an order is passed under S. 13 of the *Mamlatdars' Act* (III of 1876), to sue to set the same aside, neither extinguishes his title to land nor vests the same in his opponent. 21 B. 91.

(b) The order of a *Mamlatdar* would not, if not contested by a regular suit within three years, bar the remedy, by way of a suit for partition, of the person against whom the order is passed. 15 B. 299.

(c) Nor would it extinguish the title to land. 20 B. 270.

4.—‘Right to such property shall be extinguished.’—(continued).**(21) Arrears due under a periodically recurring right :—**

Though the general rule is that a person entitled to a periodically recurring right must establish his title before he can recover arrears accruing due under such title, that rule would not apply to a case where the person suing for the arrears has already obtained, against the person liable to pay the arrears, a decree declaratory of his title. In such a case, he can recover the arrears not barred by limitation. 5 B. 68; 9 B. 111.

But, if the claim for a declaration of the title were itself barred by limitation, the claim for the arrears would also be barred. 15 B. 135.

(22) Suit by co-sharer :—

In a suit to recover possession of immoveable property, by a co-sharer, it is necessary to find whether art. 142 or art. 144 will apply to the circumstances of the case, before determining whether the right had been extinguished under S. 28. 2 C.W.N. 315.

(23) Foreign Judgment—Non-extinction of title :—

Where limitation bars the remedy, but does not destroy the right, the judgment of a foreign tribunal is not open to the objection that the suit (on a contract) was barred by the Law of Limitation applicable in the country where the contract was made. 2 M. 400.

(24) Omission to set up fraud :—

Omission of a vendor, who continues in possession of the land sold, to set up fraud within three years or twelve years from the date of sale, does not extinguish his title thereto or debar him from raising the plea of fraud as against the vendee suing to recover possession on the strength of the sale deed. 14 B. 232.

‘Adverse possession.’**(1) What is ——— ?**

The possession necessary to extinguish the title of the rightful owner must be *adverse*. Occupation of land, therefore, with the permission of the owner, for more than twelve years, though without payment of any rent, will not extinguish the title of the owner. 2 U.B.R. (1892-1896), 369.

(2) Assertion of adverse title by mortgagee :—

A mere ——— in possession would not make his possession adverse or enable him to abbreviate the period of 60 years allowed for redemption. 1 A. 655.

(3) Widow asserting absolute title :—

A widow cannot, by merely asserting an absolute proprietary title in course of time, acquire such title by prescription against the reversionary heirs of her husband, because the latter are not entitled to recover possession till her death. 88 P.R. 1881.

'Adverse possession.'—(*continued*).

(4) Gift to minor son—Enjoyment by father :—

When the paternal uncles of a minor made a gift to him of their undivided share in certain property belonging in common to themselves and the father of the minor and in the management of the father, and the latter continued in possession for more than twelve years after the minor donee attained his majority, *held*, such possession was not adverse to the minor and that the latter could enforce his rights by a suit for partition. 27 B. 31—4 Bom. L.R. 754.

(5) Calculation of adverse possession :—

In calculating the twelve years' adverse possession, the possession of one trespasser cannot be added on to that of another. 2 C.W.N. 315.

(6) Extinction of title—Waste land—Burden of proof :—

In suits for possession of land, plaintiff ought to show possession and dispossession within 12 years prior to suit. But, if such land remained waste and unoccupied up to a short time before suit, the plaintiff has only to show a *prima facie* title to the land without being under a necessity to prove acts of possession within twelve years prior to suit. 105 P. R. 1901.

(7) Burden of proof :—

Where, in a suit for possession of immoveable property, adverse possession is set up by the defendant, the plaintiff ought to show, in the first instance, that he had been in possession within twelve years prior to suit. 14 A. 193 (16 C. 473, 11 A. 438).

(8) Possession—Title—Burden of proof :—

Possession is *prima facie* evidence of title and is primarily exclusive, and it is for him who impugns such exclusive title to show that the possession originated in a way not to affect his own right. 20 B. 270.

(9) Redemption of mortgage—Burden of proof :—

In a suit for possession of land by redemption of a mortgage, the plaintiff must show that he had a subsisting title at the date of suit, on default to prove which, his suit will be liable to dismissal. 11 A. 438—9 A.W.N. 155.

(10) Ejectment-suit—Burden of proof :—

In an ——— the plaintiff will succeed if he proves more than twelve years' adverse possession, even though he fails to prove his title to the land. 3 C. 224.

(11) Plea :—

The point, whether defendant has acquired a title by prescription, is one that need not be pleaded expressly, because adverse possession for more than twelve years is only evidence of title. 24 M. 387 (396)—5 C.W.N. 545 (P.G.)

THE FIRST SCHEDULE.

(See section 2)


[Repealed by Act XII of 1891.]

THE SECOND SCHEDULE.

(See section 4.)

First Division : Suits.

(General.)

 The following cases, though not bearing on any particular article of the schedule, are prefixed to the schedule of articles, for purposes of reference on general questions regarding construction of the articles, &c.

(1) Institution of suit :—

The filing of a *Vakalatnamah* is not tantamount to institution of a suit. 5 W. R. Waste Land Ref. p. 1.

(2) Construction of articles :—

(a) The articles of the Act ought to be so construed as to make them harmonious and consistent. 8 C.W.N. 476 (479).

(b) In construing the articles, stress must not be laid exclusively on the entry in the first column of the second schedule, ignoring the entry in the third column. 13 M.L.J. 412.

(3) Applicability of articles :—

Where there is an article general in its terms and another specific in terms and embracing a particular suit, it is the latter article that will apply. 26 A. 482. (See, further, the same case under article 2, *infra*.)

(4) ————— to penal enactments :—

The articles in the Act are no bar to the enforcement of a claim arising under a penal enactment : (e.g.) a claim under §. 2 of Act XIII of 1859 can be enforced, notwithstanding that the civil remedy is barred by limitation. 11 M. 332.

(5) Test as to applicability of articles :—

(a) It is the frame of a suit that governs the question which article of the Limitation Act applies to it. 27 B. 363 (368).

(b) Whether art. 179 or 178 of the Act will apply to an application for execution, will depend on the nature and portion of the decree sought to be executed and upon the application being the first, or a subsequent, application. 13 M.L.J. 412.

(6) Suspension of the law of limitation :—

Where, in a suit for arrears of rent brought more than three years from the due date, it is found that the plaintiff had, within the three years, brought a suit claiming enhancement of rent including that for the year in question, the operation of the law of limitation would be stayed. 8 C.W.N. 1—80 C. 1083 (P. 6).

General.—(continued).

(7) Competency of Court to decide question of limitation :—

If a Court, otherwise competent to hear a suit, wrongly decides a question of limitation arising therein, the decree would not, on that account, become a nullity. It would, nevertheless, be a good and valid decree unless and until reversed in the manner provided by law. A.W.N. (1904), p. 110—1 A.L.J. 217 [following 25 B. 337 (P.C.).]

PART I.—Thirty days.

Description of suit.	Period of limitation.	Time from which period begins to run.
1.—To contest an award of the Board of Revenue under Act No. XXIII of 1863 (<i>to provide for the adjudication of claims to waste lands</i>).	Thirty days. ⁽¹⁾	When notice of the award is delivered to the plaintiff.

(Old Acts.)

[Art. 1 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

(1) Power of Court to extend time :—

The Court had no power to extend the period of thirty days allowed by Act XXIII of 1863, S. 5, for preferring a suit. 5 W.R. (Waste Land Court Ref.) p. 1.

PART II.—Ninety days.

2.—For compensation ⁽¹⁾ for doing, or for omitting to do, an act alleged to be in pursuance of any enactment ⁽²⁾ in force for the time being in British India.	Ninety days.	When the Act or omission takes place.
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(Old Acts.)

[Art. 2 of Act IX of 1871.—Same as above.

S. 1. cl. 2 of Act XIV of 1859.—To suits for pecuniary penalties or forfeitures for the breach of any law or regulation—the period of one year from the time the cause of action arose.]

(Notes)

(1) Scope of article :—

(a) The defendant seeking the benefit of this article must show that he had reasonable grounds for justifying his action under the particular enactment relied upon by him. He must have assumed to act in the honest exercise of a supposed statutory power. 124 P.R. 1897.

(Notes).—(continued).

(b) The reasonableness of the belief is immaterial, if the belief be honest, though it is an important element in determining the question of honesty. 100 P.R. 1883.

(c) Notwithstanding the fact that a certain suit may fall under another article of the schedule, the defendant may insist upon the benefit of this article. 123 P.R. 1886.

(d) **Complaint against Governor and Council, Madras :—**

The High Court of Judicature, Madras, has no jurisdiction in a ——— for oppression or injury. 8 M. 24 (F.B.).

(2) **Act XVIII of 1850 (Protection of Judicial Officers):—**

(a) Judicial officers are exempted from liability for acts done, or ordered by them to be done, in the discharge of their judicial duties. 12 A. 115.

(b) A suit for damages for wrongful deprivation of property, brought against a Judge, alleging malice, is not governed by this article. 10 B.H.C. (A.C.) 346.

1. — ‘*Compensation.*’

(A) **Suit for refund of tolls :—**

A ——— falls under this article. To bring a suit under the article, it is requisite to show that defendant took the money in what he, acting with ordinary care and intelligence, believed, and honestly might believe, to be an act in pursuance of an enactment for the time being in force in British India and also that the relief sought falls under the term “compensation.” 65 P.R. 1886.

(B) **Suit for illegal or excessive distress :—**

(a) A ——— against a Municipal Board falls under art. 28, which is a specific article, and not under this article, which is wide and general in its terms. 26 A. 482.

(b) A suit for illegal distraint of crops by a landlord does not fall under this article. It will be governed by art. 28 or art. 29. 7 C.W.N. 728.

(C) **Suit for town duties :—**

• A suit to recover certain town duties is not governed by this article. 25 B. 887.

2. ‘*In pursuance of any enactment in force.*’

Burden of proof—Point to be proved :—

It is not enough for the defendant, pleading this article in bar of a suit, to assert that he honestly believed that the Act, in pursuance of which the alleged illegal act was committed, was in force. He must show that the Act was actually in force at the time and place of the acts complained of. 105 P.R. 1886.

NOTE.—Certain suits for damages for acts done or omitted to be done fall under some special or local enactments, which provide special periods of limitation. In such cases, the special periods

2.—‘In pursuance of any enactment in force.’—(continued).

of limitation provided by such Acts will generally be applicable. In cases, however, where such special periods are inapplicable, either this article or some other article of this Act will apply. Such cases are collected hereunder:—

(1) Act XXXII of 1880 (Income Tax), S. 248 :—

held to apply to a suit for refund of income-tax collected twice over from plaintiff, whether the Collectors acted legally or illegally in making such collections. 5 W.R. 137.

(2) Act III of 1864 (Bengal), S. 37 : —

(a) *held* to apply only to suits brought for damages in respect of acts done by Municipal Commissioners under the Act and for purposes of the Act. 5 B.L.R. Ap. 50;

(b) and not to suits in ejectment against Municipal Commissioners. 6 C. 8 (F.B.).

(3) Act IV of 1876 (Bengal Municipality), S. 337 :—

held to apply to a suit against Municipal Commissioners for injuries caused to plaintiff's house by works done by the defendants-Commissioners; but the suit was dismissed on the ground that it was not brought within three months from the date of the accrual of the special damage to the plaintiff. 18 C. 91.

(4) Act II of 1888 (Bengal), S. 427 :—

Where an act of the Calcutta Municipal Corporation was not one under Act II of 1888 (B.C.), or purporting to be done thereunder, *held*, the special limitation provided by S. 427 of Act II of 1888 would not apply. 30 C. 317.

(5) Act XV of 1873 (N.W.P. Municipality), S. 43 :—

(a)——— is applicable only to suits brought against a Municipal body for something done under the Act, in which compensation is claimed, and not to those in which no compensation is claimed. To the latter class of suits, art. 120 of the general Limitation is applicable. 4 A. 102.

(b) The notice of suit required by——— is necessary only when the suit is for compensation for an act done by the Municipal Committee under the Act. 1 A. 269.

(6) Act II of 1865 (Bombay), S. 240 :—

held to apply only to suits for damages, and not to suits in ejectment. 12 B.H.C.R. 250.

(7) Act VI of 1873 (Bombay District Municipality), S. 36 :—

is applicable only to suits for damages, and not to suits other than such suits, (*c. g.*) suits in ejectment &c. 6 B. 580.

But the section is not confined only to an action for damages; it is applicable to every claim of a pecuniary character arising out of the acts of Municipal bodies or officers, who, in the *bona fide* discharge of their public duties, might have committed illegalities not justified by their powers. In this case, the suit was for money illegally levied as house-tax. 8 B. 421.

2.—‘In pursuance of any enactment in force.’—(continued).

(8)* Act II of 1864 (Madras Revenue Recovery), S. 59 :—

A suit to set aside a revenue-sale on the ground of fraud and collusion between the Revenue-officer conducting the sale and the purchaser, falls under S. 59 of the above Act : and not under this article. 26 M. 638.

(9) Act I of 1884 (City of Madras Municipality), S. 433 :—

By——, the period of limitation for the commencement of suits against the Commissioners, in respect of anything done in pursuance of the powers given by the Act, is fixed at six months. 25 M. 118.

(10) Act IV of 1884 (Madras District Municipalities), S. 261 :—

(a) —applies only to suits for *compensation* for anything done under the Act. 16 M. 474. 2 M. 124 was a case similar to the above, under Madras Act III of 1871, which was the predecessor of Act IV of 1884.

(b) This article does not, but art. 36 *does*, govern a suit by a Municipal Council against its late Chairman, to recover money embezzled by the Manager during the defendant's chairmanship. 22 M. 342.

(11) Act V of 1884 (Madras Local Boards), S. 156 :—

(a) Whether——applies to suits other than those for compensation for wrongful acts committed under colour of the Act?—*Quare*. 16 M. 296.

(b) The notice required by——is not necessary in a suit other than that for *compensation* for anything done or omitted under the Act. 16 M. 317.

(c) The above section would not apply unless it were proved that the act complained of was done by the servants of a Taluq Board within the scope of their authority, as such, acting or purporting to act under the Act. 18 M. 442.

PART III.—Six months.

3.—Under the Specific Relief Act, 1877, section 9, to recover possession⁽¹⁾ of immoveable property⁽²⁾. *Six months.* When the dispossession⁽³⁾ occurs.

(Old Acts.)

[Art. 3 of Act IX of 1871.

Under Act No. XIV of 1859 (to provide for the limitation of suits) section 15, to recover possession of immoveable property——Six months——When the dispossession occurs.

Section 15 of Act XIV of 1859.

If any person shall, without his consent, have been dispossessed of any immovable property otherwise than by due course of law, such person, or any person claiming through him, shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such

(Old Acts).—(continued).

dispossession. But nothing in this section shall bar the person from whom such possession shall have been so recovered, or any other person, instituting a suit to establish his title to such property and to recover possession thereof within the period limited by this Act.]

(Notes)

Object of Article.

- (1) The— is to discourage proceedings calculated to lead to serious breaches of the peace and to provide against the person taking the law into his own hands from deriving any benefit from the process. 2 M.H.C. 813.
- (2) The—, as well as S. 9 of the Specific Relief Act, is to discourage people from taking the law into their own hands, however good their title may be. It has not the effect of depriving a man of his right to rely on his previous possession in an action of ejectment against a mere trespasser, who has no title at all. 8 B. 371 (375).
- (3) The— is only to provide a special remedy for a particular kind of grievance—(i.e.) to replace in possession a person evicted by a wrongful act of a powerful party and to prevent the powerful person from shifting the evidence of proof from himself to another person less able to support it. 9 W.R. 602.
- (4) In a suit for possession within six months from the date of dispossession, the plaintiff is entitled, under this Act, to recover, notwithstanding any other title. 1 M.H.C. 85.

Scope of Article.

(1) Exclusion of question of title :—

Where the plaintiff wants to recover independently of the question of title, he must bring his suit within six months from the date of dispossession. 15 W.R. 98.

(2) Suit by non-occupancy tenant :—

The limitation applicable to a suit to recover possession by a non-occupancy raiyat who has been dispossessed from his holding by his landlord, otherwise than in due course of law, is six months from the date of dispossession. 7 C.W.N. 218.

(3) Suit by tenant against landlord :—

(a) A tenant, illegally ousted from his holding, may sue his landlord for recovery of possession, and can succeed, without any enquiry into his title, if he sues within six months from the date of his dispossession. But, if he comes in after six months, he can succeed only on proof of some title to be restored to possession. 11 W.R. 168.

(b) If a landlord turns out a tenant by taking the law into his own hands, the latter may maintain a suit against the former under this article and recover possession without reference to the question of the title of the landlord to eject him. 9 W. R. 513.

(4) Applicability of article :

The article is applicable to a suit by a person who, being, whatever his title, in possession of immoveable property, is ousted therefrom.—*Per* EDGE, C.J., and STRAIGHT and TYRRELL, JJ.

Scope of article.—(continued).

Per MAHMOOD J.—A person suing, upon a mere possessory title, to recover possession against a person who has ousted him, must bring his suit under S. 9 of the Specific Relief Act, and within six months from the date of dispossession. 18 A. 537 = 11 A.W.N. 196. (F.B.).

(5) Plaintiff's inability to make out title :—

A plaintiff, who cannot make out a title, cannot maintain a suit for restoration to possession on the ground of previous possession and dispossession, except under this article—(i.e.) within six months from the dispossession. 24 W.R. 435; affirmed on appeal by 7 I.A. 73 (P.C.)—6 C.L. R. 249.

(6) No bar to suit upon title :—

This article is ———brought by a person dispossessed otherwise than in due course of law. It only enacts that a summary suit to be restored to possession without an enquiry into title, ought to be brought within a shorter time. Other articles in the Act would apply to suits brought upon title. 2 M.H.C. 318.

(7) Suit against undisputed owner :—

In an ordinary suit, not brought under this article, a person dispossessed otherwise than in due course of law cannot recover possession, as against the undisputed owner, merely by proving his previous possession and dispossession. 14 W.R. 41.

(8) Partial disturbance of possession :—

A suit would lie under this article even when plaintiff's possession is disturbed but partially. 3 M. 250.

(9) Title of a third party :—

The ———cannot be set up by the defendant-dispossessor in a suit brought under this article, (i.e.) within six months from the dispossession. Nor would the fact of the suit being brought more than six months from the dispossession affect the title of the plaintiff to be restored to possession as against the dispossessor, who has no title at all. 15 W. R. 278. Compare 20 B. 270 (273), which holds that the defendant may, in a suit in ejectment, plead and succeed on the plea that the title to the land is in a third person.

See, further, cases under the Heading **Suits independent of the article** at pp. 690 to 692, *infra*.

I.—‘Possession.’

(1) Possession :—

Discontinuance of payment of rent by tenants is not dispossession. S. 9 of the Specific Relief Act only applies to cases in which a person in physical possession is dispossessed. 14 C. 649: Compare 15 C. 527.

(2) Possession—Principal and agent :—

An agent cannot maintain a suit under this article against his principal returning upon his own property in the possession of the agent without any breach of the peace or violence. 3 C. 243 (247).

1.—‘Possession.’—(continued).

(3) Possession—Right to fish :—

A suit for possession of a right to fish in a tank, the soil of which belongs to another, does not come within the purview of S. 9 of the Specific Relief Act, nor, consequently, under this article. 18 C. 80; 19 C. 544 (F.B.): Compare 3 C. 276.

But see 12 B. 221, which holds that such a right is immoveable property and a suit to recover possession of such right falls under S. 9 of the Specific Relief Act.

2.—‘Immoveable Property.’

(1) Right of ferry :—

A——— is immoveable property within this article. 13 M. 54.

(2) Right of way :—

The article is inapplicable to a suit to enforce a mere right of way. 17 W.R. 70.

(3) Alluvial land—Re-formation on old sites :—

When land is gradually re-formed on old site, identity of site can give no title to the former owner to the land re-formed, nor can identity of site give any title to land gradually re-formed, when it is formed by gradual accretion partly to one land and partly to another. A person in possession of land is *prima facie* entitled to it, and to all increments to it. 8 W.R. 164.

(4) Right to fish :—

The——— in a tank, is immoveable property, and a suit to recover possession of such right falls under S. 9 of the Specific Relief Act. 12 B. 221. Compare 19 C. 547 (F.B.) noted under Heading No. (1), *supra*.

3.—‘Dispossession.’

Dispossession—Carrying away crop :—

The mere intervention of a third party between a lessor and his lessee and carrying away crop, will not constitute a dispossession, so as to give a cause of action to the landlord to sue under this article. 25 W.R. 180.

Suits independent of this article.

NOTE.—Whether, in a suit, other than one brought under this article and S. 9 of the Specific Relief Act—(i.e.) more than six months from the date of dispossession—for recovery of possession from a defendant who has trespassed on property in possession of plaintiff, the latter can succeed merely on the strength of his previous possession short of the statutory period without proving his title, is a point on which the High Courts differ, the High Court of Calcutta holding that the plaintiff cannot succeed without proof of his title and the other High Courts holding that he can. The following is a collection of such cases :—

1. This article would bar a plaintiff's title to recover simply on the strength of his previous possession without entering into the question of title, if he brought his suit more than six months from the date of dispossession. 7 I.A. 79 (P.C.)—6 C.L.R. 249.

3.—'Dispossession.'—(continued).

Suits independent of this article.—(continued).

(N.B.) In this case, the Government, who were entitled to the lands, had put the defendants in possession, and the latter had been maintained in possession by a Magistrate's order under the Criminal Procedure Code.

2. Lawful possession in plaintiff is sufficient evidence of his ownership as against a person who has no title whatever and who is a mere trespasser. The former can obtain a declaratory decree and an injunction against the latter. 20 C. 884=20 I.A. 99 (P.C.).

(N.B.) (a) In this case, the plaintiff was in possession when he brought his suit against the defendant wrong-doer and sued only for a declaration and injunction.

(b) In this case, their Lordships of the Privy Council say (*vide* p. 842) that, if the plaintiff could, under S. 9 of the Specific Relief Act, recover possession as against a disposessor who could show a title, "it is certainly right and just that he should be able, against a person who has no title and is a mere wrong-doer, to obtain a declaration as owner and an injunction to restrain the wrong-doer from interfering with his possession."

3. Except in a suit under S. 9 of the Specific Relief Act, which must, under article 3 of the Limitation Act, be brought within six months from the date of dispossession, mere proof of dispossession within twelve years prior to suit without proof of title is not sufficient to entitle plaintiff to a decree. 17 C. 256; 9 C. 39=11 C.L.R. 342; 9 C. 130=11 C.L.R. 393; see also 7 W.R. 331 and *per* PRINSEP J. in 5 C.L.R. 278;

4. and this, even if the defendant fails to establish his title. 26 C. 579 (*distinguishing* 20 C. 884=20 I.A. 99, on the ground stated in Note (a) under case No. 2, *supra*.)

5. The above cases follow 7 I.A. 73=6 C.L.R. 249 (P.C.)—see case No. 1 under this heading—and practically overrule the decision of MORRIS J. in 5 C.L.R. 278, 7 C. 591=9 C.L.R. 164 and 8 W.R. 386 (389), which had held that proof of previous possession and dispossession by a wrongful disposessor within 12 years prior to suit would be enough to entitle a plaintiff to a decree for possession against a defendant, who could not show any title, even if the suit were brought more than six months from the date of dispossession.

But contra:—

1. Independently of S. 9 of the Specific Relief Act, a person dispossessed of immovable property by a trespasser having no title, can maintain a suit against the latter more than six months from the date of dispossession, and succeed on the sole ground of his previous possession without proving his title. 13 A. 537 (F.B.)=11 A.W.N. 196.

2. A person, ousted by another who has no better title, can recover on the strength of his previous possession, though such possession was without title, in a suit brought more than six months from the date of

3.—'Dispossession.'—(continued).

Suits independent of this article.—(continued).

dispossession, independently of the provisions of S. 9 of the Specific Relief Act, which does not take away such right. *Per* SUBRAMANIA IYER, J. in 28 M. 179.

Contra Per O'FARRELL, J.—Such person cannot recover possession except under s. 9 of the Specific Relief Act, (*i.e.*) except when the suit is brought within six months from the date of dispossession. *Ibid.*

3. Possession is a good title against all persons except the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owners, who dispossesses him. The above rule will hold good where possession and title are both pleaded by plaintiff but he fails to prove the title. 6 B. 215 (F. B.).
4. A person in possession can maintain a suit in ejectment, against a dispossessor who has no title at all, even after six months from the date of dispossession, and without resorting to a possessory suit under S. 9 of the Specific Relief Act, possession being a good title against all the world except the real owner. 8 B. 371. [*Following* 9 C. 744 (F.B.), 6 B. 215, and *dissenting from* 7 B.H.C.A.C. 82.]
5. A person in lawful possession of land, though he does not prove his title thereto, is entitled to obtain a decree declaring his present possession, as against a defendant who, without a title, disturbs such possession. 20 B. 798 (*following* 20 C. 834 = 20 I. A. 99).
6. The possession of a person (not shown to have originated wrongfully) is good against the whole world except a person who could show a better title, the burden of proving which lies on the latter. In the absence of such proof, the former would be entitled to a decree declaratory of his possession. 25 B. 287.
7. In a suit in ejectment the defendant may plead, and succeed on the plea, that the title to the land is in a third person. 20 B. 270 (273).

See, further, cases under the heading **Scope of article** at pp. 688 and 689, *supra*.

4.—Under Act No. IX of 1860 **Six months.**

(to provide for the speedy determination of certain disputes between workmen engaged in Railway and other public works and their employers), section I.

When the wages, hire or price of work claimed accrue or accrues due.

(Old Acts.)

[Art. 4 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

- 5.**—Under the Code of Civil Procedure, Chapter XXXIX (*Of Summary Procedure on Negotiable Instruments*). **Six months.** When the instrument sued upon becomes due and payable.

(Old Acts.)

[Art. 5, Act IX of 1871. Under Act No. V of 1866 (*to provide a summary procedure on bills of exchange, and to amend, in certain respects, the Commercial law of British India*)—six months—when the bill or promissory note becomes due and payable.

Act XIV of 1859.—No corresponding provision].

PART IV.—One year.

- 6.**—Upon a Statute, Act, Regulation or Bye-law,⁽¹⁾ for a penalty or forfeiture.⁽²⁾ **One year.** When the penalty or forfeiture is incurred.

(Old Acts.)

[Art. 6 of Act IX of 1871. Same as above.

S. 1, cl. 2 of Act XIV of 1859. To suits for pecuniary penalties or forfeitures for the breach of any law or regulation—the period of one year from the time the cause of action arose.]

(Notes)

1.—‘Bye-law.’

A clause in a lease from Government, entitling plaintiffs to certain grazing fees, authorising impounding and the levy of an extra fee in the case of cattle grazed without permission, is a bye-law within the meaning of the article. 3 P.R. 1875.

2.—‘Penalty or forfeiture.’

(a) Recovery of profession tax :—

A suit for ——— under the Towns Improvement Act III of 1871 is not governed by this article, the same not being a penalty or forfeiture. 8 M. 124.

(b) Arrears of revenue :—

A suit for ——— is not governed by this article, but falls within the special provision contained in S. 118 of the Land Revenue Act in the Central Provinces. 16 C.P.L.R. 52.

(c) Money due under a statutory liability :—

A suit for ——— to pay it, (*e.g.*) for the residue of sale-proceeds of an estate sold under the provisions of Act XI of 1859 (Bengal), is governed by art. 120 and not by this article. 20 C. 51 (57).

- 7.**—For the wages⁽¹⁾ of a household servant,⁽²⁾ artisan, or labourer⁽³⁾ not provided for by this schedule, No. 4. **One year.** When the wages accrue due.⁽⁴⁾

(Old Acts.)

[Art. 7, Act IX of 1871. Same as above, except that, in place of the word 'household,' there was the word 'domestic' before 'servant.'

S. 1, cl. 2, of Act XIV of 1859. *To suit to recover the wages of servants, artisans or laborers—the period of one year, from the time the cause of action arose.]*

(Notes)

'Scope of article.'

(1) Suit by one employe against another :—

The article is applicable only to a suit by a servant against the employer, and not to a suit by one employe against a co-employe whose duty it is to receive the salary of the whole establishment and make disbursements.
4 M.H.C. 43 : Cf. 13 W.R. 150=4 B.L.R. Ap. 68.

(2) Suit for purakudivaram :—

——— or cultivator's share of the produce of land due to plaintiff under an agreement for cultivation of land belonging to defendant, does not fall under this article. 2 M.H.C. 397.

1.—'Wages.'

Mookhtear :—

A ———, employed on a distinct contract for payment of a monthly salary, is not a 'servant'; nor is balance of pay due to him 'wages' within the meaning of S. 1, cl. 2 of Act XIV of 1859. 6 W.R. Civil Ref. 11.

2.—'Household servant.'

(1) Temple servant :—

A ———, whose duties are to sweep and clean a temple, provide flowers for daily worship and garlands for the idol, is not a household servant or laborer.
7 M. 99.

(2) Factory Gumastah :—

A ——— employed on a monthly salary is a 'servant' coming within the article. The wages due to him is a debt, for recovery of which a fresh starting point may be given by an acknowledgment under S. 19 *supra*. 5 W. R.S.C. Ref. 8.

(3) Village Chowkidar :—

A ———, notwithstanding the fact of his being under the control of the police-darogah, is a 'servant' within the meaning of S. 1, cl. 2 of Act XIV of 1859. 18 W R. 298.

(N.B.)—Whether a 'servant,' similar to those in Nos. 2 and 3 *supra*, will be a household servant within the altered wording of the present article, has not been decided.

2.—‘Household servant.’—(continued).

• The following classes of persons are not servants :—

(1) Mohurrir :—

A——appointed by a Collector to serve on a monthly salary under a Butwara Ameen, a superior ministerial officer. 13 W.R. 150=4 B.L.R. Ap. 68.

(2) Tahsildar :—

A——employed by a landlord for collection of rents from tenants on a specified monthly salary. 1 B.L.R.S.N. 20=10 W.R. 260.

(3) Teacher or Instructor :—

A——for giving instructions in fencing or wrestling. 8 M.H.C. 87.

(4) Mookhtear :—

A——employed on a distinct contract for payment of a monthly salary. 6 W. R. Civil Ref. 11.

3.—‘Artizan or labourer.’

Contractor :—

A contracting bricklayer, who does not himself work, is not an artisan or labourer. 7 M. 100.

(NOTE).—This was a decision under Act XIII of 1859, but noted here for purposes of definition of the terms ‘artisan’ and ‘labourer.’

4.—‘When the wages accrue due.’

In a suit for recovery of salary due to a servant employed on a fixed monthly salary, the cause of action for each month’s salary arises on the first of the succeeding month. 6 W.R. Civil Ref. 33.

8.—For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house. **One year.** When the food or drink is delivered.

(Old Acts.)

[Art. 8 of Act IX of 1871.

Same as above.

Act XIV of 1859,
S. 1, cl. 2.

To suits for the amount of tavern bills or bills for board or lodging only—the period of one year from the time the cause of action arose].

9.—For the price of lodging. **One year.** When the price becomes payable.

(Old Acts.)

[Art. 9 of Act IX of 1871.

Same as above except that in the last column, there were the words ‘when the lodging ends’ instead of the words ‘when the price becomes payable’ in the present article.

Ol. 2 of S. 1 of Act XIV of 1859,

See the same printed under art. 8, supra.]

- 10.**—To enforce a right of pre-emption, whether the right is founded on law⁽¹⁾ or general usage, or on special contract. *One year.* When the purchaser takes, under the sale sought to be impeached, physical possession⁽²⁾ of the whole of the property sold⁽³⁾, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.⁽⁴⁾

(Old Acts.)

- [Art. 10 of Act IX of 1871. To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract—one year—When the purchaser takes actual possession under the sale sought to be impeached.]

- S. 1, cl. I of Act XIV of 1859. *To suits to enforce the right of pre-emption, whether the same is founded on law or general usage or on special contract, the period of one year to be computed from the time at which the purchaser shall have taken possession under the sale impeached.]*

(Notes)

Scope of article.

(1) Interpretation of article :—

In interpreting the article, regard must be had to the nature of the property sold, and not to the capacity of the vendor to deliver possession. 8 A. W.N. 227.

(2) Applicability of right of pre-emption :—

- (a) The right cannot attach to a permanent lease of property. It can attach only to an absolute sale. 15 C. 184 : 8 W.R. 106 ; 25 W.R. 43.
- (b) It can attach only to a sale of property; not to the sale of a share in a suit to be instituted. 21 C. 496 = 21 I.A. 26 (P.C.) ; 3 A.W.N. 6.
- (c) It can attach only to a private sale and not to a sale by public auction. 10 W.R. 165.

(3) Requisites for the right :—

For a right of pre-emption to arise, the sale must be complete, (i.e.) there must be an entire cessation of right on the part of the vendor. 20 W.R. 216.

(4) Inconsistency of rights :—

Pre-emption, as declared in the Oudh Laws Act 1876, is not applicable where the co-sharer claiming it denies the title of the co-sharer proposing to sell, and alleges that he is himself entitled to the property. 21 C. 496 = 21 I.A. 26 (P.C.).

Scope of article.—(continued).

(5) Suit between rival pre-emptors :—

A suit, not for enforcing any right of pre-emption against the vendee, but for establishing the superiority of the right of one rival pre-emptor over that of another, is not governed by this article, but by art. 120. 11 P. R. 1893; 7 A. 167=4 A.W.N. 315.

(6) Sale of undivided share :—

A suit for pre-emption in respect of a conditional sale of an undivided share of an estate, would be governed by art. 120, and not by this article, as an undivided share cannot admit of physical possession. 87 P.R. 1893.

(7) Sale of share of shamilat :—

Where the whole of the property sold does not admit of physical possession, a share of *shamilat* being included, and where the sale is not effected by means of a registered deed, a suit for pre-emption would be governed not by this article but by art. 120. 80 P.R. 1893.

(8) Sale of undivided share in joint holding :—

A suit for pre-emption of an undivided share in a joint holding, which does not admit of physical possession being taken, and in which the purchaser acquires his title by foreclosure proceedings under Regulation XVII of 1806 and a subsequent suit for possession, is not governed by this article but by art. 120. 80 P.R. 1892.

(9) Sale under unregistered deed :—

A suit for pre-emption of a house sold by an unregistered deed, and not capable of physical possession at the time of sale, would not be governed by this article, but by Art. 120. 90 P.R. 1886.

(10) Sale of property under mortgage :—

A suit for pre-emption in respect of a sale of property in the possession of a mortgagee and not redeemable immediately, is not governed by this article, since the property sold is not capable of possession. 45 P.R. 1895; 103 P.R. 1885.

(11) Sale by absolute occupancy tenant :—

The rule of limitation applicable to pre-emption suits is not applicable to a suit by a *Malguzar* to set aside a sale, by an absolute occupancy tenant, of his holding to a stranger without first offering it to the *Mulguzar*. 1 C. P.L.R. 132; 1 C.P.L.R. 53.

(12) *Mulguzar's* suit—Mortgage by conditional sale :—

A *mulguzar's* suit to enforce a right of pre-emption in respect to property sold by an absolute occupancy tenant under a deed of mortgage by conditional sale, on which the mortgagee obtains a decree for foreclosure and possession in execution thereunder, is governed by this article. 4 C. P.L.R. 72.

(13) Mortgage to ripen into a sale :—

(a) Where a mortgage contains a covenant that on default of payment within a certain time, the mortgage should become a sale absolute, and a foreclosure-decree is obtained thereon, a suit for pre-emption in respect of such property would be governed by art. 120, and not by this article. 37 P.R. 1894.

Scope of article.—(continued).

Compare the next case. 76 P.R. 1895.

- (b) This article is not restricted in its operation to sales having immediate effect. A conditional sale ripening into an absolute sale will fall within the article, if the whole of the subject of the sale admits of physical possession. 76 P.R. 1895.

(13) Usufructuary mortgagee becoming purchaser :—

When a usufructuary mortgagee purchases the property mortgaged under an unregistered sale-deed, a suit for pre-emption would be governed by art. 120, and not by this article. 160 P.R. 1939.

(14) Mortgagee becoming owner by foreclosure :—

A suit for pre-emption against a mortgagee, who has become absolute owner by means of a foreclosure-decree obtained by him, is not governed by this article, but by article 120. 3 O.C. 184 (B.).

(15) Conditional sale or mortgage :—

- (a) No right of pre-emption arises on a mere conditional sale or mortgage, while any right of redemption remains in the mortgagor. 2 W.R. 215.
- (b) A suit for pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is governed by art. 120, where the subject of sale is not capable of physical possession and there is no registered deed of sale, and not by this article. 24 A. 17 (P.C.)=5 C.W.N. 888; 14 A.W. N. 49; 4 A. 218=2 A.W.N. 28 (F.B.); 5 A. 187=2 A.W.N. 212.

Compare, 1 A.W.N. 66=3 A. 770; 2 A.W.N. 37=4 A. 291.

- (c) In such a case limitation begins to run from the expiration of the year of grace, that being the period when the mortgagee's right becomes mature. 24 A. 17=5 C.W.N. 888 (P.C.); 3 A. 770=1 A.W.N. 66.
- (d) Where a mortgage by conditional sale becomes an absolute sale by reason of a foreclosure-decree, a suit for pre-emption may be brought under art. 120 within 6 years from the date of the order absolute and constructive possession given thereunder. 7 O.C. 8.

(16) Sale of equity of redemption :—

A suit to enforce a right of pre-emption against the purchaser of an equity of redemption of property in the usufructuary possession of a mortgagee falls under this article. 1 A. 311 (F.B.); 68 P.R. 1884.

(17) Sale under unregistered deed :—

Where the land sold does not admit of physical possession and the sale-deed is not registered, a suit for pre-emption is not governed by art. 10, but by art. 120. 1 P.L.R. 45; 14 P.R. 1904.

(17) Right of pre-emption as a defence :—

- (a) In a suit for redemption brought by the purchaser, in Malabar, of *Jemm* right against the *otti* mortgagee, the latter can set up his right of pre-emption, notwithstanding that his right to enforce pre-emption has become barred. 20 M. 805.
- (b) In a suit for redemption brought by the purchaser of a *Jemm* right against the *otti* mortgagee, the latter can set up his right of pre-emption where it has not been waived or barred by limitation. 18 M. 490.

'Commencement of time.'

(1) Mortgage by conditional sale :—

- (a) Though the law permits the pre-emptor to sue at any time within one year of the transfer of possession, there is nothing to prevent his doing so earlier. The absolute right of the mortgagee, and the consequent right to claim pre-emption, arise from the time when the sale becomes absolute. *W.R. (1864), 285.*
 - (b) In the case of a mortgage by conditional sale ripening into an absolute sale by operation of Regulation XVII of 1806, limitation would begin to run from the expiry of the year of grace. 20 A. 315 (F.B.); 103 P.R. 1901=120 P.L.R. 1901 (F.B.); 3 A. 770=1 A.W.N. 66; 5 C.W. N. 888=24 A. 17 (P.C.), *approving* 1 A. 311 (F.B.); 14 A. 405 (F.B.) =12 A.W.N. 108 (*overruling* 4 A. 414=2 A.W.N. 83 and 8 A. 54=5 A.W.N. 330); 2 N.W.P.H.C. 284. *Compare* 4 A. 291=2 A.W.N. 37.
 - (c) The period of limitation for a suit for pre-emption begins on the date the Court passes an order absolute for foreclosure, and not on the date fixed by the decree for payment. 20 A. 358 -18 A.W.N. 67 [14 A. 405=12 A.W.N. 108]; 20 A. 375.
 - (d) In a suit for pre-emption in respect of a -----, the cause of action accrues to the pre-emptor when the mortgage is finally foreclosed, and time begins to run on the date the mortgagee obtains actual possession in execution of his decree. 3 A. 610 (F.B.).
 - (e) In the case of a suit for pre-emption in respect of a property sold by a co-sharer to a stranger under a conditional sale under which possession is not transferred, the cause of action arises, not when such sale is made, but when the sale becomes absolute, and the period of limitation runs from the date physical possession is taken of the whole of the property sold. 3 A. 175.
 - (f) In the case of a-----becoming an absolute sale by operation of Regulation XVII of 1806, this article would apply (the other conditions required to make it applicable being present), and time will begin to run from the expiry of the year of grace. 20 A. 315 (F.B.).
- (NOTE).—4 A. 218 (F.B.) 2 A.W.N. 28, decided that the article applicable in such a case would be art. 120; 20 A. 315 (F.B.) treated this as a mere *obiter dictum*.
- (g) Where a mortgagee decree-holder obtains possession of the property mortgaged, a suit for pre-emption in respect of it would be in time if brought within one year from the delivery of possession or within six years from the expiry of the year of grace allowed to the mortgagor. 14 C. 761.
 - (h) In a suit for pre-emption against a conditional vendee in respect of a share in a village, limitation begins to run from the date of the conditional vendee's obtaining such possession of the status and enjoyment of his vendor as entitles him to mutation of names. 1 A. 592 [*following* 1 A. 311 (F.B.)].

(N.B.)—This was a decision under Act IX of 1871.

'Commencement of time.'—(continued).**(2) Mortgage :—**

In a suit for pre-emption in respect of property mortgaged by the owner to another, the former continuing in possession paying interest to the latter, the period of limitation is one year from the date of the deed - the fact that there was mutation of names in favor of the mortgagee at a later date not affecting the question. 2 A. 237.

(3) Mortgagee becoming purchaser :—

In a suit for pre-emption in respect of property which is sold to the usufructuary mortgagee thereof, the period of one year begins to run from the date of the contract of sale becoming completed by payment of the purchase-money. 2 A. 409.

(4) Sale by person not in possession :—

(a) Where an out-and-out sale is made by a person not in possession, the fact that the vendor was not in possession at the date of the sale would not prevent the sale being complete. The period of limitation in such a case will have to be calculated from the date of the sale, though there may be some subsequent contract between the vendor and the vendee concerning the property. 43 P.R. 1900.

(b) In the case of a ——— of property, the subject-matter of an unexecuted decree, a suit for pre-emption brought within one year of the vendor's obtaining possession in execution and from him the vendee's obtaining possession, was held in time. 8 A.W.N. 227.

(5) Sale of share in undivided zemindari mahal :—

Limitation in a suit to enforce a right of pre-emption in respect of a share in an undivided zemindari *mahal*, begins to run from the date of the registration of the deed of sale, where there is a registered sale deed. 4 A. 24 (F.B.)=1 A.W.N. 116; 4 A. 179. 1 A.W.N. 176; 4 A.W.N. 317; 15 A.W.N. 46.

(6) Sale :—

The right of pre-emption accrues and time begins to run as soon as a sale is completed, no matter whether a sale-deed is executed or not. 1 P.L. R. p. 203.

(7) Property in possession of tenants—Fraud :—

Where the property sold is in possession of tenants, limitation commences from registration of sale; and a suit brought more than one year from such date will be barred unless fraud, within the meaning of S. 18, is proved to have been committed within a year from the date of registration. 73 P.R. 1885.

(8) Sale of potential right :—

The right of pre-emption attaches to the sale of a potential right—(i.e.) a right to possession of a specific portion of property reducible to physical possession; and limitation for a suit for pre-emption will, in such a case, begin to run from the date of actual possession being taken by the vendee. 7 A.W.N. 235.

'Commencement of time.'—(continued).**(9) Purchaser being opposed in taking possession :—**

Where the purchaser is opposed, in obtaining possession, by the vendor or by some person claiming by an adverse title, time will begin from the date of the vendee's obtaining actual possession; but not so, when the objection is by a mere farmer, who only claims to pay a certain rent to the purchaser. 3 W.R. 225.

(10) Adding new defendant after time :—

Where, in a suit for pre-emption, the vendee from the original vendee is added as co-defendant after the period of limitation has elapsed, the suit must be dismissed, unless the second sale can be proved to be fictitious. 25 P.R. 1903 = 74 P.L.R. 1903.

(11) Accrual of right—Legal disability :—

The provisions of S. 7 *supra*, are applicable in computing the period of limitation in suits to enforce a right of pre-emption. 1 A. 207.

1.—'Right founded on law.'**Law to be applied :—**

Where, in a case of pre-emption, the pre-emptor and vendor are Muhammadans and the vendee is a non-Muhammadan, the law to be applied is the Muhammadan Law. 7 A. 775 (F.B.).

2.—'Physical Possession.'**(1) Definition :—**

(a) 'Physical possession' is visible and tangible possession, and not merely such possession as the nature of the subject of sale allows: 3 O.C. 184 (B.); (e.g.) an equity of redemption is not capable of physical possession and cannot be the subject of pre-emption. 160 P.R. 1889; 1 O.C. 262.

(NOTE).—Compare the words 'possession' in Act XIV of 1859, 'actual possession' in Act IX of 1871, and 'physical possession' in the present Act in the light of the remarks of the Privy Council at 24 A. 17 = 5 C.W.N. 888 (P.C.).

(b) The expression 'physical possession' means personal and immediate possession in the case of a house let to tenants, and the purchaser cannot be said to obtain physical possession so long as the tenants remain in the house even if they attorn to him and pay him rent. 15 P.L.R. 1902; 140 P.L.R. 1904.

(c) 'Possession,' here, means actual, not constructive, possession. Time begins to run for a suit for pre-emption only on the purchaser taking manual possession. 2 W.R. 5.

(d) The expression 'physical possession' means a possession cognizable by the senses, as opposed to possession perceptible through the mind only. 2 O.C. 9 (11).

(e) It implies some corporeal or perceptible act done which, of itself, conveys, or ought to convey, to the mind of a person, notice that his right has been prejudiced: where an equity of redemption is sold, it cannot be said that it is capable of 'physical possession.' 9 A. 234 = 7 A.W.N. 24.

2.—'Physical possession.'—(continued).

EXAMPLES.

(1) Sale in undivided Zemindari Mahal :—

A share in an undivided Zemindari Mahal, in which the right of a co-sharer is limited to a share of the rents, is not susceptible of 'physical possession.' On sale of such a share, the right of pre-emption would arise only when actual possession is obtained by the vendee by means of a partition. 24 A. 17 = 5 C.W.N. 888 (P.C.); Cf. 20 A. 315 (F.B.); 4 A. 24 = 1 A.W.N. 116 (F.B.); 1 A.W.N. 146; 4 A. 179 = 1 A.W.N. 176; 15 A.W.N. 46; 4 A. 218 = 2 A.W.N. 28 (F.B.); 5 A. 187 = 2 A.W.N. 212.

(2) Symbolical possession :—

Merely ——— in execution under the Civil Procedure Code, is not enough to give rise to the starting point of limitation for a suit for pre-emption. 7 W.R. 195.

(3) Receipt of rents :—

Constructive possession (i.e.) possession by receipt of rents from tenants is not 'physical possession.' 20 A. 315 (F.B.).

(4) Actual Possession :—

The words ———, in art. 10 of Act IX of 1871, meant only such possession as the nature of the thing sold admitted of at the time of the sale. 65 P.R. 1883.

(5) Sale of potential right :—

The right of pre-emption attaches to the sale of a potential right, (i.e.) a right to possession of a specific portion of property : (e.g.) a specific portion of an undivided house reducible to physical possession. 7 A.W.N. 235.

(6) Sale of shamilat :—

Where the whole of the property sold does not admit of physical possession, a share of *shamilat* being included in the sale, and where the sale is not effected by a registered deed, a suit for pre-emption would be governed not by this article, but by art. 120. 30 P.R. 1893.

(7) Sale of equity of redemption :—

In the case of ——— by the mortgagor to the mortgagee in possession, it cannot be said that there is any property capable of 'physical possession,' because 'physical' implies some corporeal or perceptible act done, which, of itself, conveys, or ought to convey, to the mind of a person, notice that his right has been prejudiced. In such a case, the pre-emptor's cause of action arises on the date of the registration of the sale. 9 A. 234 = 7 A.W.N. 24.

(8) Property in possession of tenant :—

——— under an unexpired lease is not capable of 'physical possession,' unless the purchaser takes such possession as will enable him to exercise complete physical control over the property. Neither notice to the tenant, nor attornment by him, is sufficient. 48 P.R. 1884. Cf. 65 P.R. 1883. No. (4) *supra*.

2.—‘Physical possession.’—(continued).

EXAMPLES—(continued).

(9) Sale of property decreed :—

Property decreed by Court, but not taken possession of by the decree-holder, is capable of physical possession. Where a sale is made by the decree-holder of such property before taking possession thereof in execution, a suit for pre-emption brought within one year from the vendor's taking possession will be in time. 8 A.W.N. 227.

(10) Sale of a share of a holding :—

Though what is sold purports to be a share of a holding, if the share sold was separated and in the exclusive possession of the vendor, there would be no obstacle to the purchaser getting possession of the whole of the property sold. 68 P.R. 1884.

3.—‘Of the whole of the property.’

“Whole property” :—

The words “physical possession of the subject of sale” mean physical possession of the whole of the property sold. 12 A.W.N. 77.

4.—‘When the instrument of sale is registered.’

(1) Sale of undivided share :—

As, where an undivided share in certain property is sold, the whole of the property does not admit of physical possession being taken, the period of limitation against the pre-emptor runs only from the date on which the certificate of registration is endorsed on the deed of sale. 10 P.R. 1881.

(2) Sale of share in khata, shamilat and manorial rights :—

Where the whole of the subject of the sale does not admit of physical possession as in the case of a ———, the period of limitation in a pre-emption suit must be reckoned from the date on which the instrument of sale was registered. 97 P.R. 1880 ; 10 P.R. 1881 ; 23 P.R. 1882 ; 156 P.R. 1882 ; 61 P.R. 1885.

(3) Sale of an undivided share in a holding :—

Where a share of an undivided holding is sold, no field being specified, the sale not being one which admitted of physical possession, the period of limitation must be calculated from the date when the instrument of sale was registered. 23 P.R. 1882.

(4) Sale of separate holding including share in shamilat :—

Where a sale includes a share in *shamilat*, even though the greater part of the holding may consist of a separate holding, the whole subject-matter of the sale not being capable of physical possession, the period of limitation for a suit for pre-emption is one year from the date of registration of the deed of sale. 65 P.R. 1880.

(5) Sale of equity of redemption :—

As an equity of redemption is an incorporeal right, which does not admit of physical possession, in the case of a sale thereof, limitation would begin to run from the date of registration of the deed of sale. 68 P.R. 1884 ; 9 A. 234—7 A.W.N. 24.

4.—‘When the instrument of sale is registered.’—(continued).

(6) Sale of an intangible thing :—

When the subject of sale is an intangible thing, as in the case of an undivided share in an under-proprietary holding, limitation for a suit for pre-emption must be computed from the date of the registration of the sale. 2 O.C. 9.

(7) Sale of a share in undivided mahal :—

A suit for pre-emption in respect of the ———— limitation must be computed from the date of registration of the deed of sale. 4 A. 24 (F.B.) = 1 A. W.N. 116 ; 4 A. 179 = 1 A.W.N. 176.

(8) Plea of limitation as a bar to suit :—

The defendant who pleads limitation must show that he was in possession more than a year before suit. W.R. (1864) 117.

(9) Antedated sale—Burden of proof :—

Where, in a suit for pre-emption, the plaintiff alleges that the sale deed of the defendant-vendee has been antedated, it is for the plaintiff to prove the plea, failing which and failing proof of the fact that the vendee took possession within one year prior to suit, his suit will be barred. 8 W. R. 383.

11.—By a person against whom *One year.* The date of the order. an order is passed under sections 280, 281, 282 or 335 of the Code of Civil Procedure to establish his right to, or to the present possession of, the property comprised in the order.

(Old Acts.)

There was no article in Act IX of 1871 exactly corresponding to this article; but s. 246 of Act VIII of 1859 (the old Civil Procedure Code) contained a limitation-clause allowing a period of one year for suits of the description mentioned in this article; that limitation-clause was repealed by Act IX of 1871, and was not re-enacted. The article in Act IX of 1871 very nearly approaching the description of the suit mentioned in this article, was art. 15, which ran as follows :—

“To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit—one year—the date of the final decision or order in the case by a Court competent to determine it finally.”

Act XIV of 1859

S. 1, cl. 5.

To suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is maintainable—the period of one year from the date of the final decision, award, or order in the case,

(Old Acts).—(continued).

Act XIV of 1859
S. 1, cl. 3.

To suits to set aside the sale of any property, moveable or immoveable, sold under an execution of a decree of any Civil Court not established by Royal Charter, when such suit is maintainable—the period of one year from the date at which such sale was confirmed or would otherwise have become final and conclusive if no such suit had been brought.]

(Notes)

Scope of article.

(1) Necessary conditions :—

The essential conditions required for a suit to fall under S. 283, Civil Procedure Code, and consequently, under this article, are :—an attachment ; the preferring of a claim ; investigation into such claim and an order allowing or disallowing the claim. 10 A. 479.

(2) Determination of rights :—

A suit under S. 283, Civil Procedure Code, must be determined by ascertaining the rights of the parties at the date of the adverse order. The defendant setting up a prescriptive title by adverse possession, must show that he had completed his title by such possession for over twelve years at the date of the order. 18 B. 260.

(3) Contrast between this article and art. 13 :—

(a) This article is applicable only to orders passed specifically under Ss. 280 to 283 and 335 of the present Civil Procedure Code : whereas, art. 13 (=art. 15 of Act IX of 1871) is applicable generally to orders in proceedings other than suits. 12 M. 294 ; 8 M. 82.

So, a suit by a defeated claimant, (the claim having been dismissed under S. 246 of Act VIII of 1859), for establishment of his right to possession, brought more than one year from the date of the order, but within 12 years from the date of his dispossession, was held to be in time. 12 M. 294.

So, also, a suit by a defeated claimant (the order being passed not under S. 335 but under S. 332, of the present Code) to recover possession more than one year from the date of the order, but within twelve years from his dispossession, was held to be in time. 8 M. 82.

(Compare 4 C. 610=3 C.L.R. 25 ; 9 C. 230=11 C.L.R. 368 ; 8 C.L.R. 54 ; 11 C. L.R. 443 ; and 8 M. 134 *infra* at p. 706).

(b) A suit by a defeated claimant to recover property attached and sold in execution of a decree, is regarded as one to set aside a summary order falling within the purview of art. 15 of Act IX of 1871, corresponding to art. 13 of the present Act, and governed by the one year's rule. 4 B. 611 ; 4 B. 21 ; 4 B. 23 (note) ; 9 B.H.C. 205 ; 18 B. 260 (262) ; 1 A. 881 (F.B.) ; 3 M.H.C. 220.

But, see (1) 4 C. 610=3 C.L.R. 25 and 9 C. 43, which held that such a suit was not one to set aside a summary order under art. 15 of Act IX of 1871 and that it was consequently governed by the twelve years' rule;

Scope of article.—(continued).

(2) also 9 C. 230 = 11 C.L.R. 363, which held that a suit (brought after the present Limitation Act) to establish the defeated claimant's right to, and for recovery of possession of, property in respect of which the adverse order was passed when Act VIII of 1859 (the old Civil Procedure Code) was in force, was governed by the twelve years' rule

(3) also, 8 C.L.R. 54 and 11 C.L.R. 443, which held that a suit by a defeated claimant, [more than one year after the adverse order under S. 246 of the old Civil Procedure Code (Act VIII of 1859) but within two years after Act XV of 1877, S. 2 of which gave an extension of two years, came into force,] was in time, because the period of limitation therefor was not one year under art. 15 of Act. IX of 1871 (=art. 13 of the present Act) but twelve years under the general article.

Compare 8 M. 134, which held that an order, under S. 269 of the old Civil Procedure Code, VIII of 1859 (= S. 335 of the present Code), did not lose its effect even though it (S. 269) was repealed on the 1st October, 1877, and that the purchaser, against whom such order was passed, could not set up his right unless he had sued within one year of the adverse order, to have his right to possession established.

(4) Suit against auction-purchaser :—

The auction-purchaser, as well as the decree-holder, is entitled to the benefit of the one year's rule contained in this article. If the defeated claimant's suit is not brought within one year, the auction-purchaser will be entitled to succeed on the strength of the bar by limitation. 1 C.P.L.R. 3; 74 P.L.R. 1901 : 1 O.C. 83.

(5) Judgment-debtor not necessary party to claim-proceedings :—

The judgment-debtor is not necessarily a party to the investigation of a claim. Whether he is or is not a party, will depend on the circumstances of each case. If he is a party, he will be bound by this article to bring a suit to establish his right within one year of the adverse order. If he is *not*, he will neither be affected by the order, nor limited by this article to a period of one year within which to sue for the establishment of his right. 15 C. 674 : 13 M. 366; 17 B. 629; 11 B. 114 : 3 A. 233; 1 A. W.N. 24; 1 M. 391; 2 B.L.R. Ap. 49; 6 M.H.C. 416 :—*But* see 4 M. H.C. 472 (F.B.) *contra*.

(6) Claim in execution of mortgage-decree :—

As the procedure proscribed by S. 278, Civil Procedure Code, has no application in the case of a mortgage-decree for sale, the statutory bar contained in S. 283, Civil Procedure Code, does not operate to exclude a suit by either party, where such a procedure has been adopted. 1 C.W.N. 701.

(7) Suit for goods illegally sold :—

A suit by a defeated claimant to follow, in the hands of the auction-purchaser, goods illegally attached and sold, is governed by this article. 7 C. 608 = 9 C.L.R. 8.

Scope of article.—(continued).

(8) Suit by defeated claimant for compensation :—

A suit by a defeated claimant for compensation for attachment and sale of some cattle, is not governed by this article but by art. 29. 7 C.P.L.R. 77.

(9) Property sold subject to mokurari interest :—

Where, on the allowance of a claim by a *Mokuravidar*, the property is ordered to be sold subject to the *mokurari*, and the decree-holder-purchaser brings a suit, more than one year from the date of the allowance of the claim, for a declaration that the *mokurari* was *benames* and fraudulent, the suit will be barred. 24 C. 563.

(10) Claim in respect of debts attached :—

The words 'possess' and 'possession,' in Ss. 278-283 of the Civil Procedure Code, include constructive possession, or possession in law, of debts and other intangible property. An order passed on a claim regarding such property is subject to the operation of this article. 27 M. 67 = 13 M.L. J. 467 (F.B.)

Compare 4 B. 323 and 22 W.R. 36, which held that there could be no application under S. 278 nor investigation under S. 280, Civil Procedure Code, in respect of a prohibitory order attaching a debt.

(11) Order under Act XV of 1882, S. 37 :—

Where a claim to attached property filed in the Presidency Small Cause Court of Calcutta, is disallowed, no suit to establish the right claimed by the claimant is maintainable, as the order is, under that Act, final. 18 C. 296 ; 25 C. 778.

(12) Suit against agriculturist—Deduction of time :—

In computing the period of limitation for a suit, under this article, against an agriculturist in any local area for which a Conciliator has been appointed, the time intervening between the application to the Conciliator and a grant, by him, of the required certificate, must be excluded. 8 B. 411.

(13) Suit by defeated decree-holder :—

A decree-holder, an attachment placed by whom is released on a claim by a third party after investigation under S. 280, Civil Procedure Code, is limited, by this article, to a period of one year to sue for a declaration that the property released belongs to his judgment-debtor. 15 C. 521 = 15 I.A. 123 (P.C.).

(14) Order not under Ss. 280-283 or S. 335, Civil Procedure Code :—

Where the order passed on a claim was one passed under S. 269 of the old Code and not one passed under S. 335 of the present Code, it was held that a suit (after Act X of 1877 came into force) for the establishment of the defeated claimant's title and for confirmation of possession, was governed not by this article but by art. 120. 9 C. 163 = 11 C.L.R. 409; 11 C.L.R. 863.

(15) Order against trustee, whether binding on beneficiaries :—

Where the trustee of some settled property was a party (and the beneficiaries were not parties) to a claim proceeding in execution of a decree against

Scope of article.—(continued).

one of the beneficiaries, the order made against the trustee could not affect the different interests of different classes of beneficiaries, even assuming that it could bind the beneficiaries. 16 B. 1 (at pp. 12 and 13).

(16) Civil Procedure Code, S. 332.—

An order under———does not fall under this article, because this art. does not specifically mention orders under that section. 8 M. 82; 125 P.R. 1894.

(17) No bar to enforce mortgage lien :—

An unsuccessful objector under S. 335 is not precluded by this article from enforcing his mortgage lien, more than one year from the date of rejection of his objection. 29 C. 25.

NOTE.—Here the mortgagee sues, not to establish his right to the property but merely to recover a debt owing to him on the liability of the property.

(18) Suit by purchaser from minor :—

Where an order is passed against a minor under S. 335 and the latter assigns his rights to a stranger, the latter cannot succeed in recovering the property from the party who was successful in the summary proceedings, unless a suit had been brought within one year from the date of the adverse order. 26 B. 730 = 4 Bom. L.R. 513; [9 C. 663 (F.B.) and 25 C. 409].

(19) Order under S. 335, Civil Procedure Code :—

An ——, after investigation, in favor of, or against, an auction-purchaser, is governed by this article. 7 M.L.J. 310; 9 M.L.J. 131; 6 A.W.N. 68.

(20) Suit nominally for partition :—

A suit, nominally for partition, but in substance for recovery of the very property the plaintiff failed to secure possession of in a proceeding under S. 335, Civil Procedure Code, will be barred if brought more than one year from the date of the adverse order. 3 Bom. L.R. 594 = 26 B. 146; 12 B. 625.

(21) Suit by defeated auction-purchaser :—

An auction-purchaser, against whom an order was passed under S. 209 of the old Code (S. 335 of the present Civil Procedure Code), having brought a suit more than one year after the date of the adverse order, the interval having been occupied by proceedings to get a registered certificate of sale, it was *held* that the suit was barred. 10 B. 604.

Applicability of article.**(A) The article inapplicable.—**

- (1) **This article will be inapplicable:**—where orders are not passed on claims on investigation or on the merits, such orders not having any conclusive effect. 22 B. 375; 4 B. 21; 3 A. 504; 5 B. 440; 12 C. 108; 12 C. L.R. 550; 2 W.R. 263; 6 N.W.P.H.C. 185; 3 M.H.C. 139; 18 M.265; 15 C. 521 (P.C.) = 15 I.A. 123; 15 B.L.R. 228 = 24 W.R. 75 = 2 I.A. 210 (P.C.).

Applicability of article.—(continued).**EXAMPLES.****(a) Claim ordered to be notified at sale:—**

(1) Where a claim is neither specifically allowed nor disallowed—(c. g.) when it is ordered to be notified at the sale. 7 W.R. 252; 11 C.L.R. 352 (*distinguishing* 7 W.R. 256; 21 W.R. 133; 22 W.R. 89) or

(2) Where the attached property is ordered to be sold subject to the claimant's lien. 20 W.R. 393.

(b) Court's declining to investigate:—

Where the Court declines to investigate the claim and pass orders under the claim-sections (Ss. 278 to 282, or S. 395, Civil Procedure Code), but refers the parties to a regular suit. 27 M. 25; 4 B. 21; 6 N.W.P. 185; 3 M.H.C. 139. (*Compare* 2 W.R. 263.)

(c) Claim dismissed as late:—

Where the claim is dismissed as preferred too late. 11 W.R. 364.

(d) Attachment raised:—

Where the particular attachment in respect of which the claim is preferred is raised on payment of the decree-amount, or on any other ground, though the order is passed after investigation. 13 B. 72; 7 B. 408; 18 B. 241; 31 C. 228; 8 C. 279=10 C.L.R. 204; *Cf.* 11 W.R. 134=2 B. L.R.A.C. 254.

(e) Failure to adduce evidence:—

Where the claim is disallowed on the ground that the claimant failed to adduce any evidence. 1 C.W.N. 24. *Compare* the cases noted in No. 1, under heading (B.) *infra*.

(f) Misdescription of attached property:—

Where the claim is dismissed on the sole ground that the boundaries of the property as attached and those as described in the sale deed of the claimant do not tally. 12 C. 108.

(g) Withdrawal of claim:—

Where the claimant withdraws his claim and his petition is dismissed without any investigation. 18 M. 265; 5 B. 440.

(h) Want of identity of property:—

Where the claim is dismissed on the ground that the claimant's property had not been attached. 18 M. 316; 5 M.L.J. 148.

(i) Dismissal of claim for default:—

Where the claim is dismissed for want of prosecution. 3 A. 504; 37 P.R. 1904.

(j) Inapplicability of law:—

Where a claim is dismissed on the ground that the section under which it was put in is not applicable to it. 7 W.R. 441.

(2) Definition of 'investigation':—

The term 'investigation' in S. 280, Civil Procedure Code must be understood as such investigation as the nature of the case admits of, the extent

Applicability of article.—(continued).

whereof not being fixed by the claim-sections of the Civil Procedure Code. 15 C. 521=15 I.A. 128 (P.G.); 27 C. 714.

(3) Order passed against minor :—

Where an order is passed against a minor under the Court of Wards, the proceedings not having been instituted with the sanction of the Court of Wards, and such ward institutes a suit, after attaining majority, for recovery of the property covered by the order. 27 C. 242=4 C.W.N. 405.

(4) Suit by unsuccessful decree-holder :—

Where the decree-holder, who is unsuccessful in the claim-proceedings, sues for a declaration that another decree, in execution of which the claimant got possession of the attached property, was fraudulent and collusive, the suit will be governed by art. 120. 13 C.L.R. 139.

(5) Suit outside scope of S. 283, Civil Procedure Code :—

A———, (e.g.) a suit by a decree-holder, against whom an order is passed, for a declaration that the sale under which the successful claimant claimed is unreal, or that his own (decree-holder's) mortgage is entitled to priority over the claimant's sale, is not governed by this article. 12 C. 453.

(B) The article will be applicable :—**(1) Default of claimant :—**

Where the adverse order is passed without investigation, owing to the claimant's failure to let in any evidence or to his letting in insufficient or unreliable evidence, or to his absence, such an order operating as though it was passed after investigation. 24 W.R. 411; 21 W.R. 409; 22 W. R. 39; 20 W.R. 345; 6 N.W.P.H.C. 185; 12 C.L.R. 49.

Compare 19 A. 253 (F.B.)=17 A.W.N. 60. Compare 1 C.W.N. 24 No. (e), at p. 709 *supra*.

(2) Decree-holder's suit to declare liability of whole property :—

Where a mortgage-decree-holder sues to establish his right to bring the whole of the mortgaged property to sale, the shares of the mortgagor's co-parceners being released from attachment on their claims. 12 C.L.R. 574 (*distinguishing* 10 B.L.R. 200.)

(3) Reversionary interests :—

(a) Where a reversioner's objection to the attachment of property mortgaged by a widow was disallowed and he sued to have it declared that the mortgage was invalid as against his reversionary interest : *held* that this article applied, and that the suit was maintainable. 122 P.L.R. 1904.

(b) But a reversioner, against whom an order is passed under the claim-sections in execution of a decree against the widow, will not, on account of his omission to sue under this article, be debarred from recovering the property after the widow's death. 20 B. 801.

Effect of order.**(4) Effect of order:—**

(a) An order passed in claim-proceedings, whether under Ss. 278-282 or under S. 335, will, unless a regular suit is brought within the period prescribed under this article, be conclusive so as to preclude the unsuccessful party from setting up his right in any future proceedings. 14 B. 372 (376, 377); 1 A. 381 (F.B.); 9 B. 35; 27 M. 25; 1 A. 541; 17 C. 260; 15 C. 521 = 15 I.A. 123 (P.C.); 8 M. 506; 4 M. 302; 4 B. 611; 22 B. 640; 3 M.H.C. 220.

Compare 19 A. 253 (F.B.).

(b) An order rejecting a claim under S. 281, Civil Procedure Code, gives the auction-purchaser a title against the claimant, unless the order is set aside by a suit; such suit can be brought only within one year and under this article. 17 C. 260 [referring to 15 C. 521 = 15 I.A. 123 (P.C.).]

(c) The party against whom an order is passed under the claim-sections, cannot set up his right in defence or in attack unless he sued, under this article, to have such right established. 10 M. 357; 8 M. 506; 4 M. 302; 22 B. 640; 12 B. 281; 9 B. 35; 4 B. 611; 1 A. 381; 27 C. 714.

(d) The order would have the same effect even when the subject of the claim has passed from the hands of the defeated claimant. 27 C. 714.

(e) Where a property is released from attachment in consequence of the claim of an intervenor, the attaching creditor must sue, within a year from the order of release, for a declaration that the property is liable to his decree. Otherwise his right will be barred. 7 W.R. 456.

(f) So, also, a defeated claimant. 5 A.W.N. 305; 3 A.W.N. 19; 4 A.W.N. 25.

Suit for declaration—Representative capacity of judgment-debtor:—

(g) Where the brothers of a judgment-debtor succeeded in getting their shares in a property released from attachment, in execution of a decree for rent, and the decree-holder brought a suit, within one year from the adverse order, but more than three years after the rent fell due, for a declaration that the shares of the successful objectors were also liable to the decree because the same was passed against the judgment-debtor in his representative capacity, such suit was held to be in time. 23 C. 302.

(h) Where, in substance, a person comes in as representing a deceased claimant under S. 281, Civil Procedure Code, and supporting the objections, the mere fact of his happening also to be the legal representative of a deceased judgment-debtor, would not make him a 'party to the suit' within the meaning of S. 244, Civil Procedure Code; nor the order on the claim an order under S. 244. 8 A. 626.

Necessity for a suit:—

It is only where the summary order under S. 269 of the old Code (=S. 335 of the present Code) was inconsistent with the defeated party's claim, that the latter was bound to bring a suit within one year; otherwise, not. 11 B.H.C. 174,

(Old Law.)

- (1) Where, before Act IX of 1871, a suit was brought by the defeated claimant or decree-holder, not to set aside a summary order, but to recover possession on the strength of title to possession, it was *held* that the suit was not governed by the one year's limitation contained in s. 1 cl. 5 of Act XIV of 1859, but by the twelve years' rule contained in s. 1, cl. 12, *Ibid.* 6 W.R. 69. 8 W.R. 93; 8 W.R. 73; 7 W.R. 256; such a suit not being one necessarily "to set aside an order of a Court" within the meaning of art. 15 of Act IX of 1871. 11 C. 673; 4 C. 610=3C.L.R. 25:

Also, where the suit was for declaration of right and confirmation of possession. 12 W.R. 33.

A suit by an unsuccessful claimant in possession of the attached property, for confirmation of possession had to be brought within one year of the order. 21 W.R. 133.

But see *contra*, 7 N.W.P.H.C. 113.

Compare 7 N.W.P.H.C. 223.

- (2) S. 269, Act VIII of 1859. contemplated that the person not in actual possession should sue and not the person in possession. 7 W.R. 87.

- 12.**—To set aside any of the following sales :— **One year.** When the sale is confirmed⁽³⁾, or would otherwise have become final and conclusive had no such suit been brought.
- (a) sale in execution of a decree of a Civil Court ;
 - (b) sale in pursuance of a decree or order⁽¹⁾ of a Collector or other officer of revenue ;
 - (c) sale for arrears of Government revenue or for any demand recoverable as such arrears ;⁽²⁾
 - (d) sale of a patni taluq sold for current arrears of rent.

Explanation.—In this clause 'patni' includes any intermediate tenure saleable for current arrears of rent.

(Old Acts.)

[Art. 14 of Act IX of 1871.—Same as above.

S. 1, cl. 3 of Act XIV of 1859.—*In effect same as above.*]

(Notes)**Scope of Article.****A.—Article inapplicable.**

Where a sale in execution is null and void for want of jurisdiction in the Court ordering it or for other causes, or it does not affect a stranger's interest and bind him or there is no occasion or necessity to set it aside, this article will not apply to a suit to set it aside or to a suit which has the indirect effect of setting it aside,

*Scope of article.—(continued).***A.—Article inapplicable—(continued).****EXAMPLES.****(1) Property not belonging to judgment-debtor :—**

Where the suit is to set aside a sale of property not belonging to the judgment-debtor, but to a stranger who has no notice of it : such stranger may treat it as a *nullity* and sue to recover the property at any time within twelve years from the date of his losing possession 26 A. 346 = A.W.N. (1904), 35 (*distinguishing* 25 B. 337); 5 A. 614 = 3 A.W.N. 165.

(1-a) Two sales of the same property :—

Where there are two sales, in execution, of the same property and, after the first sale, no interest in the property is left for a second sale, there is no necessity, on the part of the first purchaser, to seek the cancellation of the second sale, the title acquired by him being unaffected by the second sale. 25 C. 179 = 24 I.A. 170 = 1 C.W.N. 639 (**P.C.**).

(2) Want of jurisdiction :—

Where the Court ordering a sale in execution has no jurisdiction. 18 C. 526 ; 5 A. 614 = 3 A.W.N. 165 ; 15 A. 324 ; 76 P.R. 1890.

(3) Confirmation of sale after reversal of decree :—

Where a sale is confirmed by a Court after the reversal, in appeal, of the decree under which it took place ; such confirmation being one without jurisdiction. 2 B. 540.

(4) Sale against S. 290, Civil Procedure Code :—

Where the sale in execution is in violation of the rule contained in S. 290, Civil Procedure Code : (*i.e.*) when it takes place before the expiry of thirty days from the proclamation. 7 A. 289 ; 11 A. 333.

But see 21 C. 66 (**P.C.**) = 20 I.A. 176 under Heading **B**, *infra*.

(5) Omission to bring in legal representatives :—

Where there is an ——— of a judgment-debtor and to follow the procedure prescribed by Ss. 233 to 248 of the Civil Procedure Code, a sale in execution becomes a nullity. *Per* PARSONS, J. in 21 B. 424 (**F.B.**).

(6) Decree against minor not properly represented :—

Where the decree, in execution of which the sale took place, was against a minor, who was not properly represented in the suit. 12 B. 18 ; 11 B. 130

(6-a) Suit by person not party to sale :—

Where the suit is by a stranger to the decree and execution proceedings, whose property is sold behind his back, there being no necessity in such a case to have the sale set aside. 20 M. 118 (**F.B.**) = 7 M.L.J. 52 ; 18 M. 478 ; 5 M. 54 ; 4 M. 178 ; 9 C.P.L.R. 113 ; 3 C.P.L.R. 162 ; 5 B.H.C. A.C. 139 ; 1 L.B.R. 53 ; 10 A.W.N. 224 ; 7 W.R. 256 = B.L.R. Sup. Vol. 643 ; 8 W.R. 358 ; 9 B. 86 (91).

But see 7 M. 258, which holds that even a stranger to the sale ought to sue under this article.

Scope of article.—(continued).**A.—Article inapplicable—(continued).****EXAMPLES.—(continued).****(7) Suit for declaration that Plaintiff's interest was not affected:—**

Where the suit is for a declaration that a purchase by defendant does not affect plaintiff's interest in the property sold. 25 C. 179=24 I.A. 170 (P.C.); 26 B. 577 (581); Cf. 23 A. 383=28 I.A. 118 (P.C.) and 24 B. 435 (455).

(8) Suit in personal capacity—Decree in representative capacity:—

(a) Where the suit is by a person in his personal capacity to set aside a sale in execution of a decree obtained against him in his representative capacity. 9 C.L.R. 18. Compare 7 B. 188. .

(b) Also, where the case is converse. 9 B. 169; Compare 7 B. 188, which is almost to the same effect.

(9) Decree against tenant—Suit by landlord:—

Where the suit is by the landholder for a declaration that a sale, in execution of a mortgage-decree against the occupancy tenant, was invalid, and for the ejectment of the purchaser. 10 A.W.N. 69; 8 A.W.N. 154.

(10) Suit by Hindu son—Decree and sale against father:—

Where the suit is by a Hindu son for possession of his share of ancestral property from a purchaser of father's interest in execution of a decree against the latter alone. 1 A.W.N. 109.

(11) Suit by members of a Malabar tarwad:—

A———to recover land sold in execution of a decree in a suit which was brought against a person who was, but was not sued as, *karnavan*, and in which it was not alleged that the debt was a *tarwad* debt,—is not governed by this article. 7 M. 512.

(12) Mortgage by Mahomedan mother—Suit by son:—

Where a suit was by a Mahomedan son, on attaining majority, to recover property mortgaged during his minority by his mother, an uncertificated guardian, and sold in execution of a decree obtained against the minor as represented by the mother. 5 O.C. 197.

(13) Suit to recover plaintiff's share:—

Where the plaintiff brought a suit to recover his share in a certain property, the defendant having purchased his (plaintiff's) co-sharer's share and having taken possession also of plaintiff's share. 24 W.R. 302.

(14) Judgment-debtor's not having saleable interest:—

Where the suit is to set aside a sale on the ground of———. 9 W.R. 199.

(15) Certificate not in conformity with sale:—

Where a suit was to recover possession of property by a person dispossessed under a certificate of sale which was not conformable to or warranted by the sale itself. 7 W.R. 253; 17 W.R. 429.

(16) Sale subject to plaintiff's claim:—

Where a suit was to set aside an execution-sale which took place subject to the plaintiff's claim. 7 W.R. 252.

Scope of article.—(continued).**A.—Article inapplicable.—(concluded).****EXAMPLES—(concluded).****(17) Suit to set aside fraudulent deed :—**

Where the suit was to set aside a fraudulent deed under colour of which a sale was effected. 6 W.R. 305.

(18) Claim on proceeds of sale :—

A claim by a puisne mortgagee on the proceeds of sale of the mortgaged property sold in execution of the decree obtained by the first mortgagee, where the sale is admitted but not sought to be set aside, is not governed by this article or art. 18. 9 M. 57.

(19) Suit for redemption :—

A . . . by the assignee of a mortgagor, as against the mortgagee who brought the mortgaged property to sale in violation of S. 93 of the Transfer of Property Act and purchased it himself, is not governed by this article, it not being incumbent on the mortgagor to bring a suit to set aside such sale. 5 Bom. L.R. 952.

(20) Fraud :—

The article is not applicable to a suit to set aside an execution-sale on the ground of fraud. 6 A. 406=4 A.W.N. 140.

(21) Reversioner's suit—Fraud and collusion :—

A . . . for setting aside a sale in execution of a decree against the widow on the ground of fraud and collusion between her and the decree-holder, is not governed by this article, because he sues, not as a person bound to set aside the sale, but as one seeking a declaration that the sale is not binding on his reversionary interest; art. 95 will govern such suit. 11 B. 119 (*Compare* 5 B.H.C.A.C. 139; 6 W.R. 305.)

(22) Where there is no claim and no order :

The article has no application where no claim has been preferred and no order has been passed at all under the claim-sections. 18 M. 13 (17).

(NOTE)—*Read and Compare* the cases collected under heading A—under Cls. (b) and (c) *infra* at pp. 718 and 719.

B.—Article applicable.

- (1) Where a sale is merely irregular but not void, the Court having had jurisdiction, throughout, to execute the decree and to order sale of property therein, it will be valid until set aside. Hence the necessity for setting it aside by suit. To suits of that description this article has been held to apply.

EXAMPLES :**(a) Sale without notice to proper legal representatives :—**

Where a sale took place without notice of execution to the legal representatives of a deceased judgment-debtor, or after notice of execution given to a person who was supposed to be, but in reality was not, the legal representative. 25 B. 337 (P.C.)=27 I.A. 216=2 Bom. L.R. 927=10 M.L.J. 368=5 C.W.N. 10; *Compare* 30 C. 142 and 10 M.L.J. 126.

Scope of article.--(continued).

B.—Article applicable.—(continued).

EXAMPLES.—(continued).

- (b) **Relief dependent on annulment of sale :—**
 Though, where the relief asked for is different from the annulment of a sale it is dependent on the cancellation of sale. *Ibid.*
- (c) **Sale against S. 290, Civil Procedure Code :—**
 (a) Where a sale in execution takes place within thirty days from the proclamation of sale and contrary to the provisions of S. 290, Civil Procedure Code. *Per BROADBENT, J. in 11 A. 333 (EDGE, C. J.—contra).*
 (b) Such a sale will be merely irregular, and not a nullity without proof of substantial injury. 21 C. 66 (P.C.) = 20 I.A. 176.
- (d) **Sale against S. 291, Civil Procedure Code :—**
 So, also, a sale without a compliance with the provisions of S. 291, Civil Procedure Code. 24 C. 291.
- (e) **Mistake as to extent of property sold :—**
 Where a purchaser at Court-sale brings a suit complaining that he was led into a mistake as to the extent of the property sold; the remedy in such a case not being by way of an application under S. 318, Civil Procedure Code, but by a separate suit. 20 C. 8 = 19 I.A. 154 (P.C.).
- (f) **Suit for declaration that purchase was benami :—**
 Where a suit is brought by a judgment-debtor on the ground that the decree and the purchase at the execution-sale thereunder were *benami*. 17 C. 769 (F.B.). (It should be noted that a suit brought by the judgment-debtor on the ground of fraud will not be maintainable, the remedy in such a case being by way of an application under S. 311, Civil Procedure Code).
- (g) **Non-compliance with S. 306, Civil Procedure Code :—**
 Where, at a sale, there is a failure on the part of the purchaser to pay, and on the part of the officer conducting the sale to receive, the deposit required by the above section. 16 C. 33.
- (h) **Adjustment of decree not reported to Court :—**
 Where property is brought to sale, execution-proceedings having been taken without a report to the Court of the adjustment of the decree between the decree-holder and the judgment-debtor; in such a case, the sale is irregular and not *void*, because the Court has jurisdiction to sell, being ignorant of the adjustment, and the purchaser being innocent. 15 C. 557.
- (i) **Execution barred by limitation :—**
 (1) A judgment-debtor can maintain a suit for a declaration that a sale in execution is invalid on the ground that execution had been barred by limitation and an order granting it had been reversed, on appeal, subsequent to the sale. To such a suit, this article may apply. 10 C. 220.

Scope of article.—(continued).**B.—Article applicable—(continued).****EXAMPLES.—(concluded).**

- (2) A sale, though irregular owing to the decree in execution of which it was held being barred by limitation, is nevertheless valid until set aside. A suit by the judgment-debtor to set aside such sale, is governed by this article. 11 C. 287.
- (j) **Suit on ground of fraud :—**
Where a suit is brought by a judgment-debtor to set aside a sale on the ground of fraud, but fraud is not specifically alleged and proved. 19 C. 683 (P.C.)=19 I.A. 166.
- (k) **Existence of cross-decrees :—**
The mere existence of a cross-decree for a higher amount in favor of the judgment-debtor will not render the execution-proceedings taken by a judgment-creditor for a lower amount void, so long as the Court has jurisdiction to order execution and sale. If, in such a case, a suit is brought to set aside the sale, this article may apply. 14 C. 18 (P.C.)=13 I.A. 106.
- (l) **Property partly within and partly without jurisdiction :—**
Where the property sold is partly within, and partly beyond, the jurisdiction of the Court executing the decree and selling the property. 12 C. 307 (11 B.L.R. 56=19 W.R. 434).
- (2) **Suit to set aside sale in execution :—**
A —, if it were otherwise maintainable, is governed by this article. 12 C. 597.
- (3) **Suit in substance to set aside sale :—**
Where the suit is substantially one to set aside an execution-sale, though, ostensibly, there is a prayer for possession and declaration of title, this article would apply if the decree in execution of which the sale took place is voidable and not void. 22 W.R. 84 ; 2 C. 98.
- (4) **Suit by defeated claimant—Auction purchaser :—**
A suit by a defeated claimant, to which the auction-purchaser is made a party, to recover possession of property sold in execution, is governed by this article. 1 O.C. 83.
- (5) **Suit to set aside sale during minority of plaintiff :—**
A ——— will be barred, if it is brought more than one year from the date of the plaintiff's attaining majority. 17 M. 316 (323)=4 M.L.J. 152.
(NOTE). See the same case at p. 577.
- (6) **Suit by auction purchaser :—**
A ——— for cancellation of sale on the ground that the property put up at the sale was wrongly described, this article would apply. 10 B. 214.
- (7) **Suit by judgment-debtor on reversal of decree :—**
A ——— to set aside a sale that took place in pursuance of the decree, which was subsequently reversed on appeal, is governed by this article. 5 A. 573=3 A.W.N. 158.

Scope of article.—(continued).

B.—Article applicable—(concluded).

(8) Suit to set aside purchase by prior mortgagee :—

A——— at a sale held in execution of a decree obtained by the second mortgagee, must be brought within one year under this article. 12 M.L.J. 390.

(9) Sale under Madras Act II of 1864 (Revenue Recovery): —

In a——— non-compliance by the Collector with the directions of Ss. 38 & 39 of the Revenue Recovery Act (Madras), will not invalidate the sale or affect the title of the auction-purchaser. A suit, therefore, to set aside such a sale will be governed by this article. 6 M. 148.

(C) Object of article.

The object of the article is to protect *bona fide* purchasers only. 6 M. 148; 9 M. 457 : A purchaser, who was a party to a fraud in the sale, cannot take advantage of the shorter period provided by the article. To such a case art. 95 of the Act will apply. 9 M. 457; 6 M. 148.

Clauses (b) and (c).

A.—Inapplicability of clauses.

The clauses will be inapplicable, as in the cases of sales falling under clause (a) to a sale void *ab initio*, e.g. when the officer ordering it had no jurisdiction; or when a stranger's interests in the property sold remain unaffected notwithstanding the sale. In such a case the sale is, in the eye of the law, non-existent from the very commencement and consequently there will be no necessity to set it aside. But a sale, merely affected by an irregularity the officer ordering it having had jurisdiction, is not illegal or void but is simply voidable and will be in force until set aside. Hence the necessity to set it aside. A suit to set aside such a sale will be governed by this article. 12 M. 168 (F.B.) at p. 178.

EXAMPLES OF VOID SALES.

(1) Sale by Collector having no jurisdiction :—

Where a Collector sells property ostensibly in execution of a decree of a Civil Court but the sale is not authorized by the decree. 19 A. 808 = 17 A. W.N. 71 (15 A. 324).

Compare 11 B. 429, which decided that art. 14 *infra*, which is analogous to this article, did not apply to a case where the order of the Revenue officer was without jurisdiction, and that the party affected need not sue to set aside the order.

(2) Sale under Bengal Act XI of 1859 :—

(a) A sale held under Bengal Act XI of 1859 without a compliance with the provisions of S. 6 of the Act. 11 C. 200 (F.B.).

(b) A———, when there was nothing due from the plaintiff as arrear, will be void, though no appeal was preferred to the Commissioner, such a sale being altogether without jurisdiction. 25 C. 893 = 25 I.A. 151 (P.C.) :

Scope of article.—(continued).

A.—Inapplicability of clauses—(concluded).

EXAMPLES OF VOID SALES.—(concluded).

(c) although the ground, viz., that nothing was due from him which could be recovered as an arrear of Government revenue, was not declared and specified in an appeal to the Commissioner. 25 C. 876: [following 10 W.R. (F.B.) 66=2 B.L.R. 1 (F.B.), and distinguishing 21 C. 70=20 I.A. 165 (P.C.)].

(d) Recovery of property from auction-purchaser Fraud :—

A suit to recover property, sold under Act XI of 1859 (Bengal), from a person who, being the agent of the plaintiff, fraudulently purchased the property at the sale in the name of his son, is governed by art. 95, and not by this article, although there is a prayer also for the reversal of the sale. 3 C. 300.

(e) No arrear due Fraud :—

A suit to set aside a sale for arrears of revenue on the ground that, no arrear being due, it was *ultra vires* and that it was affected by fraud, was held governed by this article. 8 C. 329.

(NOTE).—In this case the grounds of *fraud* and no arrear being due were taken for the first time in second appeal and these grounds were rejected from consideration because the plaintiffs were guilty of laches.

(3) Decree and sale fraudulent :—

A suit to set aside a sale on the ground that the decree resulting in the sale and the suit resulting in the decree were fraudulent and collusive from the beginning to the end, is maintainable on the ground that the sale in such a case is a nullity. 28 C. 475 (P.C.); 29 C. 395 (P.C.)=29 I.A. 99.

(NOTE).—This article would not apply to such a suit.

(4) Suit for possession by stranger to sale :—

A suit to recover property, from the purchaser thereof at a revenue-sale, on the ground that the property purporting to have been sold did not belong to the alleged defaulter, is not governed by this article, but by the twelve years' limitation. 1 B.R. (1893-1900), 109.

(b) Sales under Act VII of 1880 (Bengal) :—

(a) Where the notice required by S. 10 of the Act had not been served at all, the certificate would not have the effect of a decree, and a suit to have the sale set aside would be governed by art. 120 and not by this article. 1 C.W.N. 516. (Mittra's Limitation, p. 808).

(b) A ---, without the issue at all of the notice required by S. 10 of the Act, is void, and a suit to set it aside would not be governed by this article. 27 C. 698.

Read and Compare the cases collected under the heading A, at pp. 712 to 715 *supra*.

Scope of article.—(concluded).**B.—Applicability of Clauses.**

Where the revenue-sale is not a nullity but is merely irregular, the Revenue officer having jurisdiction to order the sale of the property, this article will be applicable :—

EXAMPLES.**(1) Suit for recovery of possession—Sale under Act VIII of 1865 (Madras) :—**

A suit for recovery of possession of land sold under Madras Act VIII of 1865 will be governed by this article, if the sale be irregular but not void, even though there is no prayer for the cancellation of the sale. 20 M. 33—6 M.L.J. 278.

(2) Sale under Act VII of 1880 (Bengal) :—

(a) A suit to set aside a sale in execution of a certificate issued under the above Act, on the ground of material irregularity, is maintainable. 29 C. 73 (F.B.)=5 C.W.N. 521; 6 C.W.N. 246; 14 C. 9.

(NOTE).—Such a suit will be governed by this article as regards limitation.

Compare 5 C.W.N. 86.

(b) If the certificate granted under the Act is not cancelled within one year from the granting thereof, a suit to set aside a sale in execution of such certificate will be barred by this article. 26 C. 172.

(3) Sale under Madras Act II of 1864—Fraud :—

A suit to set aside, on the ground of fraud, a revenue-sale (under Madras Act II of 1864) which was not void but voidable, brought more than six months from the discovery of fraud, was held barred, considering together this article and S. 59 of Madras Act II of 1864. 12 M. 168 (175), (F.B.); 3 M.L.J. 255.

Compare 9 M. 457, which held that a suit to set aside a revenue-sale, grounded on fraud, was governed by art. 95. (NOTE).—In this case the question whether the provisions of S. 59 of Madras Act II of 1864, which provided a shorter period of limitation, was applicable, was not discussed; and the sale was void *ab initio*, and, as such, there was no necessity for setting it aside.

(NOTE).—Read and Compare the cases collected under heading B, at pp. 715 to 718 *supra*.

1.—‘Order.’

The word— means an order of the nature of a decree made in a judicial capacity. 8 B.H.C.A.C. 219.

2.—‘Demand recoverable as arrears of revenue.’**Sale for arrears of rent :—**

Where the sale, though not for arrears of revenue, is one for arrears of rent recoverable as arrears of revenue, the article will apply, when the suit is brought by the occupant of the land. 13 B. 221.

3.—‘Confirmed.’

(1) ‘Where sale is not confirmed :—

A suit, by a stranger to a decree and execution-proceedings thereunder for recovery of possession of his share in property sold in execution, will not be governed by this article if the sale is not confirmed. 18 M. 478.

(2) Confirmation of sale, interpretation of :—

Where the Board of Revenue, first discharged and subsequently confirmed an order of the Commissioner confirming a sale by the Collector, the period of limitation should be computed from the date of the subsequent order of confirmation by the Board. 28 C. 775 (P.C.)=28 I.A. 45.

13.—To alter or set aside a decision or order⁽¹⁾ of a Civil Court in any proceeding other than a suit⁽²⁾. **One year.** The date of the final decision⁽³⁾ or order in the case by a Court competent to determine it finally⁽⁴⁾.

(Old Acts.)

[Art. 15 of Act IX of 1871.—Same as above.

S. 1, cl. 5 of Act XIV of 1859.

To suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is maintainable—the period of one year from the date of the final decision, award, or order in the case.]

(Notes)

Scope of article.

1.—‘To alter or set aside a decision or order.’

A.—Cases where suits have been held not to be for ‘setting aside or altering decisions or orders.’

(1) Suit for injunction :—

A suit, *not* for setting aside an order, but for an *injunction* restraining the defendant from unjustly and inequitably availing himself of an order, which was the result of his own mistake and the mistake of the Court passing the same, *held* not governed by this article. 5 C. 86 (97) = 4 C. L.R. 434.

(2) Suit for declaration of proprietary right :—

A suit for a declaration of plaintiff's proprietary right to land, to be maintained in possession thereof free from liability to pay rent to the defendant and to have it declared that a decree obtained by the defendant in a Revenue Court charging plaintiff with liability to pay rent, *held* not governed by this article, it not being competent for the Revenue Court to entertain the present suit, and there being no necessity to set aside such a decision. 8 A. 40.

(3) Suit by member of Hindu family for his share :—

A suit by the son of a member of a joint Hindu family, for his share of family property sold, by the elder brothers of his father, under a certificate of

Scope of Article.—(continued).

guardianship and a permission of the Court obtained by them under Act XL of 1858 during the minority of the plaintiff's father, *held* not a suit 'to set aside the order' granting the certificate, and not governed by this article. 5 C. 363—5 C.L.R. 374.

(4) Suit by Mahomedan co-heir :—

A suit by plaintiff, a co-heir under the Mahomedan Law, to recover his or her share in property sold in execution of a decree obtained against the ancestor, the plaintiff not being made a party to the suit or the execution-proceedings, would not be governed by this article, the share of the plaintiff not being affected by the sale and there being no necessity to set aside such sale. 4 C. 142—3 C.L.R. 223 (F.B.).

(5) Suit by unsuccessful claimant for property :—

(a) A ———— for recovery of property sold in execution, the plaintiff's claim thereto having been disallowed, *held* not governed by this article, the suit being one not to set aside the order but one to establish the plaintiff's title to the property claimed by him in execution-proceedings. 4 C. 610—3 C.L.R. 25.

(b) A ———— to recover his share in property sold in execution of an *ex parte* decree against the manager of his family, on the ground that the decree was fraudulent and collusive, *held* not governed by S. 1, cl. 5 of Act XIV of 1859. 1 M.H.C. 263.

(6) Orders under Act XXVII of 1860 :—

A suit by a party against whom an order was passed under Act XXVII for recovery of property on the ground of title, was not governed by art. 15 of Act IX of 1871, corresponding to the present article. 8 W.R. 126.

(7) Suit for possession on title :—

A ————, (i.e.) by right of inheritance was held not to be a suit to set aside a summary order under S. 1, cl. 5 of Act XIV of 1859. 6 W.R. 69—(See same case at p. 712, *supra*, under the heading *Old Law*).

(8) Mamlatdar's order :—

A suit for possession in opposition to a Mamlatdar's order under Bombay Act V of 1864, held not to be a suit to set aside a summary order under S. 1, cl. 5 of Act XIV of 1859. 10 B.H.C.A.C. 479.

(B) Cases where suits have been held to be for altering or setting aside decisions or orders.**(1) Unsuccessful claimant's suit for attached property :—**

(a) An ———— for recovery of property attached in execution may be construed to be a suit to set aside an order on his claim under S. 246, of the old Civil Procedure Code (Act VIII of 1859). 4 B. 21 : *Cf.* 4 B. 611.

(NOTE).—This was a case under Act IX of 1871.

(b) An ———— against the decree-holder and auction-purchaser to set aside a sale subsequent to the rejection of the plaintiff's claim in execution *held* governed by art. 15 of Act IX of 1871, corresponding to this article. 4 B. 611.

Scope of article.—(concluded).

- **B. Cases where suits have been held to be for altering or setting aside decisions or orders.—(concluded).**

(2) Suit by decree-holder :—

A ———— to establish his right to attach, and bring to sale, property which has been released from attachment at the instance of a claimant, *held* governed by art. 15 of Act IX of 1871 (=art. 13 of the present Act). 25 W.R. 513.

(3) Appointment of member on temple Committee :—

A suit for a declaration that an order by a District Judge appointing a person as a member of a temple committee is illegal and invalid, is virtually a suit to set aside such order and the same, not being one passed in a suit, is governed by this article and not by art. 120. 3 M.L.J. 128.

1.—‘Proceeding.’

The article will apply only where the plaintiff, who is affected by the order, was a party to the proceedings in which it was passed, the Court being empowered to pass orders deciding matters of dispute properly raised for hearing by a summary proceeding between the parties disputing. 4 M.H.C. 297 (301).

2.—‘In any proceeding other than a suit.’**(A) Decisions or orders in proceedings in suits.****(1) Execution-proceedings are proceedings in suit :—**

An order passed in proceedings in execution of a decree is an order passed in a proceeding in a suit. 8 C. 51 (P.C.) 8 I.A. 123; 11 C.L.R. 13; 9 C. 446.

(2) Suit to set aside order in execution :—

An order in execution-proceedings is an order in a “suit” as provided for by S. 4 of Act VI of 1892. A suit to set aside such an order is not governed by this article. 3 O.C. 85.

(3) Order under S. 295, Civil Procedure Code :—

An ———— regarding the distribution of sale-proceeds is a ‘proceeding in a suit’, such an order being a step in execution-proceedings—which proceedings are proceedings in the suit in which the decree is passed : *compare* 9 W.R. 514. To a suit to recover money improperly distributed, this article is inapplicable. 23 A. 319; 28 I.A. 408 (P.C.)—5 C.W.N. 649—3 Bom. L.R. 713; 65 P.R. 1896; 15 B. 438 (*dissenting from* 13 C. 159).

Compare 12 M. 294 (296), & 9 M. 57 which *held* that an order on a claim, under S. 246 of Act VIII of 1859, is one in proceedings in execution and consequently one in a ‘suit’ and that this article is not applicable to set aside such an order.

Compare, also 8 M. 134, noted under S. 11, at p. 706, *supra*.

But see 17 W.R. 227 (F.B.), 16 W.R. 11, which *held* that a suit of this description was one to set aside a summary order and was governed by S. 1, cl. 5 of Act XIV of 1859 corresponding to this article.

(NOTE.)—This decision was one under Act XIV of 1859, S. 1, cl. 5 of which did not contain the words “in any proceeding other than a suit” or any thing to that effect.

2.—‘In any proceeding other than a suit.’—(concluded).

A.—Decisions or orders in proceedings in suits.—(concluded).

(4) Suit for recovery of sale-proceeds improperly distributed :—

A——— is not one to set aside an order under S. 295, Civil Procedure Code, an order under the section not being a final adjudication on the rights of the parties claiming such sale-proceeds, the section itself specially providing for such a suit and there being, thus, no necessity to set it aside. 23 A. 313=28 L.A. 203 (P.C.) ; 15 B. 438 ; 12 C. 499.

(5) Order under S. 332, Civil Procedure Code :—

A suit to set aside an——— is not governed by this article, the order being one passed in execution-proceedings and, consequently, in proceedings in a suit. 8 M. 82 ; 125 P.R. 1894.

(6) Suit by decree-holder for possession :—

A——— of property released from attachment at the instance of a claimant, but not to set aside the order of release was not governed by S. 1, cl. 5 of Act XIV of 1859, corresponding to this article. 8 W.R. 93.

B.—Decisions or orders in proceedings other than those in suits.

(1) Order under S. 90 of Act V of 1881 :—

A suit to set aside an alienation by a Hindoo Widow, will be governed by this article, even though without necessity, if the same were made under an order of the District Judge under S. 90 of the above Act. 26 C. 607.

(2) Order under Act X of 1889 (Bengal) :—

If the suit were directly to set aside an order under S. 77 of the Act, the limitation of one year would apply ; if, however, the suit was for real property on the plaintiff's general right, it was held that the twelve years' limitation was applicable. 8 W.R. 294.

(3) Order under Act XIX of 1841 :—

A suit by an unsuccessful claimant in a proceeding under Act XIX of 1841, for his share in property dealt with thereby, on the ground of title to share, was held not governed by S. 1, cl. 5, of Act XIV of 1859, whether the order was passed after enquiry or the petition was rejected without any enquiry. 1 W.R. 40 ; B.L.R. Sup. 633=7 W.R. 199.

(4) Grant of certificate of heirship—Suit for property :—

Suit to recover properties by the rightful heir of a deceased person, more than one year after grant of certificate of heirship to the rival claimant, is not governed by this article, and is not barred, there being no necessity to have the order granting the certificate cancelled. 10 B. 449.

See, further, Nos. 6 and 8 at p. 722 *supra*.

3.—‘Final decision.’

Final decision, meaning of :—

The ‘final decision’ contemplated by the article is a final decision of the Court, which has competent jurisdiction to determine the case finally, and not the decision of an appellate Court rejecting an appeal from such decision for want of jurisdiction. 7 W.R. 151.

4.—'Court competent to determine it finally.'

(1) • Order by a Court not competent :—

An ———— to pass it, need not be cancelled; a suit, therefore, to realize proceeds of a sale, in execution, wrongfully taken by defendant under an order purporting to have been passed under S. 270 of the old Code, corresponding to S. 295 of the present Civil Procedure Code, but by a Court not competent to pass it, was held not governed by this article.

1 A. 333 (F.B.).

N.B.—Compare cases under heading A under S. 12(a) at pp. 712 to 715, and heading A under S. 12(b & c) at pp. 718 and 719.

(2) Suit by purchaser at auction-sale :—

A suit by purchasers at an auction-sale, subsequently set aside, to recover possession of the property purchased is not governed by this article.

14 A.W.N. 78.

- 14.—To set aside any act⁽¹⁾ or order⁽²⁾ of an officer of Government in his official capacity, not herein otherwise expressly provided for. **One year.** The date of the act or order.

(Old Acts.)

[Art. 16 of Act IX of 1871.—Same as above, except that, in the present Act, there are the additional words "or order" after the word "act."

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Suit involving setting aside of order :—

(a) A———, though it does not directly pray for the setting aside of an order, is governed by this article. If, therefore, a plaintiff cannot succeed on his title or recover possession as long as an order contemplated by this article stands in his way, he must sue to set aside the order. To such a suit this article would apply. 24 A. 467 [following 25 B. 337 (P.C.)=27 I.A. 216=2 Bom.L.R. 927=10 M.L.J. 368=5 C.W.N. 10; *Per STRACHEY, C.J.*, at p. 22 A. 168 (176); and *distinguishing* 25 C. 179].

(b) Articles 12 and 14 refer to orders and proceedings of a functionary to which, by law, is given a particular effect in favor of one person or against another, subject, in the regular course, to a further judicial proceeding having for its object to quash them or set them aside. 11 B. 429 (132).

(2) Order without jurisdiction :—

An order of a Government officer without jurisdiction and beyond the range of his functions, is a nullity, and need not be set aside. To such orders this article will not apply. 11 B. 429.

N.B.—Read and Compare Nos. 2 to 6 under heading A at p. 718 and Nos. 1 to 5 under heading A at pp. 718 and 719.

Scope of article.—(continued).

A.—Suits governed by the article.

(1) Grant of land by Collector—Suit for possession :—

A suit for possession of land, on the ground that it was plaintiff's property and that the grant thereof by the Collector to the defendant, for building purposes under S. 37 of the Bombay Land Revenue Code, was not proper, is governed by this article, the Collector having had jurisdiction to pass the order he did. 15 B. 424.

(2) Suit for recovery of penal assessment :—

A suit for the recovery of money paid for penal assessment, will be barred after one year from the date it was levied, either under this article or art. 16. 13 M.L.J. 269.

(3) Order under N. I. Canal and Drainage Act :—

A suit to set aside an order made under S. 68, Northern India Canal and Drainage Act, 1873, is governed by this article. 25 P.R. 1893.

(4) Suit to set aside an order *ultra vires* :—

Although this article does not apply when the order is *ultra vires*, still, if the plaintiff brings a suit to set it aside on that ground, he will be bound to sue within one year under this article. 10 A.W.N. 195.

(5) Suit for cancellation or modification of rent :—

A——, settled by a Settlement Officer having jurisdiction to settle the rent, is governed by this article, though the suit is in the guise of one for the modification of the certificate of rent granted by the officer. 28 C. 676.

(6) Estates Partition Act (Bengal Act VIII of 1876) :—

A suit by a party to an enquiry under S. 116 of the Estates Partition Act (Bengal Act VIII of 1876), the decision of the Revenue authorities being against him, for a declaration that a land was part of his *howla*, falls under this article. 29 C. 367 = 6 C.W.N. 92 (*distinguishing* 24 C. 149).

(NOTE).—Here the Revenue authorities *had* jurisdiction to pass the order and the plaintiff was a party to the order and, therefore, the plaintiff was bound to set it aside.

(7) Sale under Regulation XLV of 1793 (Bengal) :—

A suit to cancel a——— and for the reversal of a Judge's order in appeal confirming the sale, was governed by S. 1, cl. 3 of Act XIV of 1859, the period beginning to run, at the latest, from the date of the Judge's order confirming the sale. 11 W.R. 261.

B.—Suits not governed by the article.

(1) Order a nullity :—

The article does not apply to a case where the order is an absolute nullity. Hence it does not apply to an order by a Commissioner setting aside an order passed by a Collector under S. 48 of Bengal Act VI of 1870. 21 C. 626.

Scope of article.—(continued).

B.—Suits not governed by the article.—(continued).

(2) Public Demands Recovery Act :—

A suit to set aside a sale in execution of a certificate obtained under the Public Demands Recovery Act, is governed by art. 120 and not by this article. 1 C.W.N. 516.

(3) Suit for declaration—Entry under Bengal Tenancy Act :—

A suit to have a declaration that an undisputed entry made by a Revenue officer under S. 109 of the Bengal Tenancy Act is erroneous, is not governed by this article. 7 C.W.N. 314—30 C. 20.

(4) Suit for declaration :—

The article is inapplicable to a suit for a declaration of the plaintiff's title to a certain cultivatory holding and of his right to redeem the mortgage thereof and for a cancellation of an order by the Settlement Officer—the latter prayer being a mere surplusage. 8 A.W.N. 119.

(5) Suit for declaration that land is khoti :—

A suit for a declaration that certain lands were *khoti* lands and not *dhura* lands as decided by the Survey Settlement Officer, is not governed by this article, but by art. 120. 18 B. 244.

(6) Suit for possession :—

A suit to recover possession of land, which is not necessarily one for setting aside an official act, is not governed by this article. 2 M. 906.

(7) Suit by a person dispossessed for recovery of land :—

Where land belonging to plaintiff was entered, as Government waste land, in the Revenue Survey Register, by officers of the Revenue department, who put the defendant in possession, dispossessing the plaintiff, and the latter sued to recover possession, the suit was held not governed by this article, the order of the Revenue officers being without authority and the plaintiff, consequently, not being bound to set the orders aside. 24 B. 435—2 Bom. L.R. 261.

(NOTE).—In this case, the Secretary of State was also made a defendant to the suit.

(8) Suit by co-sharer for possession of trees :—

A suit for possession of trees by some co-sharers of a village against the other co-sharers and to set aside the order of the Settlement officers made in favour of the defendants, is governed by art. 120, and not by this article. 1 A.W.N. 91.

(9) Order under Act VII of 1876 (Bengal) :—

The fact that a prayer for setting aside an order, passed under the Land Registration Act, is contained in a suit for a declaration of plaintiff's right and title to, and confirmation of possession of, property, does not render this article applicable, where the Court has no power to set aside such an order. 10 C. 525.

Scope of article.—(concluded).**B.—Suits not governed by the article.—(concluded).****(10) Order under Act VIII of 1876 (Bengal):—**

This article would not bar a suit by a person dispossessed in pursuance of an order of the Collector under S. 116 of the Estates Partition Act (Bengal Act VIII of 1876), even though no suit is brought to set aside the Collector's order under S. 150 of the Act. 24 C. 149.

(NOTE).—The Plaintiffs in this case, not having been parties to the order of the Collector, were not bound to set it aside.

(11) Suit under S. 109, Bengal Tenancy Act:—

The article would not apply where the suit is one coming within S. 109 of the Bengal Tenancy Act, to have a declaration that an undisputed entry in the *Phawati* and the *khatian* was erroneous. 30 C. 20 (27)=7 C.W. N. 314.

N.B.—Read and Compare Nos. 1 to 6 under heading A, at pp. 712 to 714 and Nos. 1 to 5 under heading A, at pp. 718 and 719 *supra*.

1.—‘Act.’

The framing of a Survey Register by a Government officer is not an ‘act’ within the contemplation of this article. 18 B. 244.

2.—‘Order.’

The ‘order’ contemplated by the article is an order passed by a Government officer between the rival parties. 18 B. 244 (250).

- 15. —Against Government to set *One year.*** When the attachment, aside any attachment, lease or transfer⁽¹⁾ of immoveable property by the Revenue-authorities for arrears of Government revenue, lease or transfer is made.

(Old Acts.)

[Art. 17 of Act IX of 1871.—Same as above.

S. 1, cl. 4 of Act XIV of 1859.

To suits to set aside any attachment, lease or transfer of any land or interest in land by the Revenue authorities for arrears of Government revenue
* * * * *—*one year from the date of such attachment, lease or transfer.*]

(Notes)**1.—‘Suit to set aside attachment, lease or transfer.’****(1) Suit to establish right to hold revenue-free:—**

A——— is governed by the twelve years’ limitation and the cause of action arises when the plaintiff is first compelled by the Collector to pay assessment; but, however, the plaintiff will be entitled to recover back only one year’s arrear under this article. 11 B.H.C.R. (A.C.) 1.

(2) Transfer of ghatwali tenure:—

A suit to set aside a transfer by Government, of a *ghatwali* tenure, when the *ghatwali* becomes a defaulter, falls under this article. 14 W.R. 208 (F.B.).

- 16.**—Against Government to recover money paid under protest⁽¹⁾ in satisfaction of a claim made by the revenue-authorities⁽²⁾ on account of arrears of revenue or on account of demands recoverable as such arrears. **One year.** When the payment is made.

(Old Acts.)

[Art. 18 of Act IX of 1871.—Same as above.

*S. 1, cl. 4 of Act XIV of 1859. * * * the latter portion of the clause corresponds word for word with the present article.]*

(Notes)

1.—‘ Under protest.’

Payment on account of admitted liability :—

Where payment was made to Government on account of a clear and admitted liability, a suit to recover the amount so paid was not governed by S. 1, cl. 4 of Act XIV of 1859, corresponding to this article. 2 N.W.P.J. C. 52.

2.—‘ Claim made by the Revenue authorities.’

(1) Suit to set aside order of a Revenue-authority :—

A ——— directing the plaintiff to pay Government-revenue at a certain rate and to recover money paid under the order, is governed by this article. 5 W.R. 47.

(2) Suit to recover penal assessment :—

A suit, for recovery of penal assessment levied by Government, would be barred if not brought within a year from the date when the assessment was levied. 13 M.L.J. 269.

- 17.**—Against Government⁽¹⁾ for compensation for land acquired for public purposes. **One year.** The date of determining the amount of the compensation.

(Old Acts.)

[Art. 19 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—‘ Against Government.’

(1) Land Acquisition Act—Award—Failure to pay amount :—

Where a Collector fails to pay or deposit in Court the amount awarded by him under the Land Acquisition Act, a suit would lie against him for the recovery of amount so awarded and this article provides for such a suit. 22 B. 802 (F.B.).

*1.—‘Against Government.’—(concluded).***(2) Refusal of compensation after limitation for suit :—**

Where compensation was refused and the party referred to a Civil suit after the period of limitation had expired, a suit by him against Government to recover it was held barred. 11 W.R. 1.

Article inapplicable.**(1) Suit for share of compensation by landlord against tenant :—**

To it ———, the whole amount having been withdrawn by the latter, the article applicable is art. 62 or art. 120 and not this article or article 36. 3 C. W.N. 202.

(2) Suit by real owner against recipient :—

Where compensation money was paid by Government to a certain person representing himself as the owner, a suit, by the real owner, for recovery of the same from the person to whom it was paid, held governed by art. 118, Act IX of 1871 (=art. 120 of this Act); and time begins to run in such a case from the date of payment of amount to defendant by Government. 5 C. 597; 8 W.R. 23.

18.—Like suit for compensation *One year.* The date of the refusal when the acquisition is not to complete.

(Old Acts.)

[Art. 20 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)**Suit for damages for refusal to make award :—**

(a) This article refers only to suits for compensation for non-completion of, and refusal to complete, the acquisition; if the acquisition had been made, a suit for damages for refusing to make an award would be governed by art. 120. 27 M. 535=14 M.L.J. 173.

Where a person was dispossessed of land, by order of the Collector, on the ground that it was ordered, by the Revenue Commissioner, to be given to another person, a suit by the former, to recover possession of land, having been brought within one year from the date of dispossession was held to be in time though more than a year had elapsed from the date of the Revenue Commissioner's order. 24 B. 435.

19.—For compensation for false *One year.* When the imprisonment ends.

(Old Acts.)

[Art. 21 of Act IX of 1871.—Same as above, except that in the present Act, the words ‘For compensation’ are prefixed to ‘for false imprisonment.’

Act XIV of 1859.—No corresponding provision.]

(Notes)

When imprisonment ends :—

- (1) A suit for false imprisonment would be barred if brought more than a year after the imprisonment ended. 9 B. 1.
- (2) Time begins to run from the date on which the Plaintiff was enlarged on bail, actual detention and complete loss of freedom being the essence of an action for false imprisonment. 30 C. 872 (P.C.)=7 C.W.N. 729=5 Bom. L.R. 490.

20.—By executors, administrators *One year.* The date of the death or representatives under Act No. XII of 1855 (*to enable executors, administrators or representatives to sue and be sued for certain wrongs*).

(Old Acts.)

[Art. 12 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

(1) **Applicability of article :—**

The Act (XII of 1855) relates only to wrongs which do not survive to the representatives of a deceased person. A suit against defendant to recover the value of an elephant wrongly sold by her deceased husband is not governed by the one year's limitation in this article, because the plaintiff's right of suit does not abate by the death of the husband, but survives against the heir viz., the widow. 1 W.R. 251.

(2) **Suit against heirs of an agent :—**

A———for recovery of papers and documents relating to the estate of the principal, will lie against the heirs or legal representatives of a deceased agent, since the cause of action for such a suit does not abate with the death of the agent. 2 N.W.P.H.C. 103.

EXAMPLES OF CASES WHERE THE CAUSE OF ACTION ABATES.

(1) **Suit for damages for wrongful arrest or malicious prosecution :—**

A———against a defendant abates on the latter's death, and the cause of action does not survive against his heir. To such a case Act XII of 1855 does not apply : (i.e.) the Act does not apply to a suit brought originally against the wrong-doer himself and subsequently sought to be continued against his heir. 13 B. 677.

(2) **Suit to recover custody of an infant :—**

A———abates on the death of the defendant, the wrongful custodian. 25 B. 574.

(3) **Suit for damages for refusal to open temple :—**

A———brought by the Superintendent of a temple, against the custodian of the keys thereof, abates on the death of the defendant. 8 M.L.J. 180.

WHEN THE CAUSE OF ACTION DOES NOT ABATE.

Appeal against decree for damages :—

An appeal by defendant in a suit, where damages for a wrong have been decreed against him by the Court of First Instance, does not abate on the death of the defendant-appellant; his heir can proceed with the appeal. 26 B. 597; 26 M. 499. *Compare* 9 A. 181.

- 21.**—By executors, administrators *One year.* The date of the death of the person killed.
or representatives⁽¹⁾ under
Act No. XIII of 1855 (*to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong*⁽²⁾).

(Old Acts.)

[Art. 13 of Act IX of 1871.—Same as above.

Act XIV of 1859.—*No corresponding provision*].

(Notes)

1.—‘By.....representatives.’

Son adopted by deceased's widow :—

A son adopted, under the Hindu Law, by the widow of the deceased, was held to be the legal representative of the deceased for the purposes of bringing a suit under this article. 7 B.H.C. 118.

2.—‘Death.....caused by an actionable wrong.’

Death caused by goods of an explosive nature :—

The person who sends, by Railway, goods of a dangerous and explosive nature without giving notice of its character to the servants of the Railway Company, must compensate for loss of life caused by the explosion of the articles sent, though the sender could not have foreseen the explosion. 1 A. 60 (F.B.).

PEARSON J., *dissenting*, held that the defendant, who could not have foreseen the explosion, would be liable, only if he omitted to take reasonable precautions to preclude the risk of explosion.

- 22.**—For compensation for any *One year.* When the injury is other injury to the person. committed.

(Old Acts.)

[Art. 22 of Act IX of 1871.

Same as above, except that the words ‘for compensation’ were not found in Act IX of 1871.

S. 1, cl. 2 of Act XIV of 1859.

To suits for damages for injury to the person, etc.—the period of one year from the time the cause of action arose.]

- 23.**—For compensation for a *One year.* When the plaintiff is acquitted⁽²⁾, or the prosecution is otherwise terminated.

(Old Acts.)

[Art. 23 of Act IX of 1871.—For a malicious prosecution,—One year—When the plaintiff is acquitted.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—'Malicious prosecution.'

- (1) **What is malicious prosecution?—**

The laying of information before the Police against the plaintiff cannot be malicious prosecution unless the Magistrate takes cognizance of the offence. Where no action is taken by the Magistrate, the suit for damages caused to the plaintiff by the false information laid before the Police will not fall under this article. 24 A. 368 (371).

- (2) **Damages for malicious statement:—**

A suit for damages on account of a false and malicious statement is not a suit for damages for *malicious prosecution*. For such a suit, limitation would run, not from the date on which the plaintiff was acquitted in proceedings taken against him in consequence of the statement, but from the date on which the alleged statement was made or the resulting damages occurred. 1 B.L.R. 17=10 W.R. 908.

2.—'Acquittal.'

- (1) **Disposal of revision petition against acquittal:—**

In a suit for damages for malicious prosecution, time begins to run from the date of the acquittal and not from the dismissal of a revision petition to the High Court against the acquittal. 23 M. 24=9 M.L.J. 138.

- (2) **Injury to reputation by malicious prosecution:—**

In a suit for damages for———, time begins to run from the date of the discharge of the plaintiff from custody, and not from the date on which the criminal charge was preferred. 8 W.R. 443.

- (3) **Acquittal on appeal:—**

If an accused person is convicted by a Magistrate but is acquitted on appeal, the date of the acquittal on appeal will be the starting point for limitation. 20 C. 41.

- (4) **Dropping of prosecution:—**

Where a prosecution is dropped when in the hands of the Police, the case never coming before a Magistrate, the date on which information was first laid before the Police against the plaintiff would be the starting point 18 W.R. 118.

General.

(1) False complaint—Detention of goods:—

In a suit for damages for wrongful attachment and detention of plaintiff's goods consequent on a false complaint to a Magistrate by defendant against the plaintiff, the attachment being an act of the Magistrate *suo motu*, the date of the complaint is the date of the wrong; and time begins to run from that date, whether this article or art. 36 is applicable. 7 B. 427.

(2) Re-presentation of plaint with proper stamp:—

Where, in a suit for damages for malicious prosecution, the plaint was re-presented, properly stamped, within the time appointed by the Court, though after the period of limitation prescribed by this article had expired, the suit was not barred, the plaint having been originally presented in time. 20 C. 41.

24.—For compensation for libel. *One year.* When the libel is published.

(Old Acts.)

[Art. 24 of Act IX of 1871.

Same as above, except that the words 'for compensation' were not there.

S. 1, cl. 2 of Act XIV of 1859.

To suits for damages for injury to reputation—the period of one year from the time the cause of action arose.]

25.—For compensation for slander. *One year.* When the words are spoken.⁽¹⁾

When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results.⁽²⁾

(Old Acts.)

[Art. 25 of Act IX of 1871.—For slander—One year—When the words are spoken.

S. 1, cl. 2 of Act XIV of 1859.

Suits for damages for injury to reputation—One year—from the time the cause of action arose.]

(Notes.)

1.—'Slander.'

False Report to Police:—

A ——— of a defamatory character may be a slander. For a suit for damages for preferring such a report, limitation would run from the date of the report. 24 A. 368.

2.—‘When the special damage.....results.’

Slander:—

Slanderous words alone, without allegation and proof of special damage, is not actionable. 28 C. 452=5 C.W.N. 659; 26 C. 658 (F.B.) (referring to 8 M. 175; 7 B.H.O.A.C. 17).

(NOTE).—This was a case on the Original Side of the High Court of Calcutta, to which the provisions of English Law apply.

But see 8 M. 175; *Per* GHOSE, J. in 26 C. 658 (F.B.)=3 C.W.N. 551 and 10 M. L.J. 83, which hold that the English Law, as to oral slander not being actionable without proof of special damage, is not applicable in this Country and that a suit will lie for malicious or culpable oral slander.

26.—For compensation for loss of *One year.* When the loss occurs. •
service occasioned by the
seduction of the plaintiff's
servant or daughter.

(Old Acts.)

[Art. 27 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Suit by a Hindu father:—

A———for compensation for loss of services occasioned by the abduction of his daughter is maintainable, and will be governed by this article.

Per STUART, C. J. in 4 A. 97.

Per OLDFIELD J., *Ibid*—Such a suit is not maintainable by a Hindu father.

27.—For compensation for inducing a person to break a contract with the plaintiff⁽¹⁾. *One year.* The date of the breach.

(Old Acts.)

[Art. 28 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—For inducing a person to break a contract with plaintiff.

A suit, under Act XIV of 1859, against a person for compensation for inducing the plaintiff's ryot who was under a contract to cultivate indigo for plaintiff to break such contract, was governed by the six years' rule. 8 W.R. 257.

28.—For compensation for an illegal, irregular or excessive distress⁽¹⁾. *One year.* The date of the distress.⁽²⁾

(Old Acts.)

[Art. 29 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

Suit for money paid in consequence of a distress :—

A suit by plaintiff, whose crops were distrained for rent due by another, to recover back money paid to redeem the crops may not be governed by this article. 24 C. 168 (*see* Mitra's Limitation, at p. 824): *Cf.* 8 M. L.J. 165.

1.—‘Illegal, irregular..... ..distress.’

(1) **Distrain by Municipality :—**

A suit, against a Municipal Board, for recovery of damages for an illegal distraint, the warrant of distraint having been procured and issued by the Secretary of the Board, is maintainable and is governed by this article, and not by art. 2. 26 A. 482—A.W.N. (1904), 95.

(2) **Distrain by landlord :—**

A suit for compensation for illegal distraint of crops by the landlord is governed by this article, and not by art. 2. 7 C.W.N. 728.

2.—*Commencement of time.***Detention of goods distrained by landlord (Madras Act VIII of 1865) :—**

Where an illegal distraint was made, *within* one year before suit, by a landlord, under Madras Act VIII of 1865 and the goods were *detained* by him till within six months before suit, the detention was held to be a continuing wrong, assuming that the act was professedly done under S. 78, of the Act, and, therefore, not barred; assuming however, that the general Limitation Act applied, the suit was in time, under this article, the seizure having been within one year before suit. 24 M. 339.

(Old Law.)

Before Act IX of 1871, the last act of taking or detention was regarded as the starting point for limitation. 3 W.R. 139 (Act X Rulings).

29.—For compensation for wrong- *One year.* The date of the seizure. full seizure⁽¹⁾ of moveable property⁽²⁾ under legal process⁽³⁾.

(Old Acts.)

[Art. 30 of Act IX of 1871.—Same as above.

Act XIV of 1859.—*No corresponding provision.*]

(Notes)

Scope of article.

(1) **Conditions necessary :—**

The——— for a suit to fall under this article are :—wrongful seizure, the seizure of moveable property under legal process, and loss to plaintiff in consequence. 7 C.W.N. 520.

Scope of article.—(concluded).

(2) * Value of goods seized:—

This article applies, whether the compensation claimed is for damages consequent on the wrongful seizure or whether it is only claimed as the value of the goods seized. 28 M. 621 (626).

(3) See also 11 M. 345 (355) under heading 3—"Legal Process," *infra*.

1.—'Wrongful seizure.'

What is seizure:—

The word 'seizure' is not confined to taking actual physical possession of property. The affixing of a seal in execution of a warrant of attachment to the outer door of a godown or warehouse in which goods are stored is sufficient to constitute wrongful seizure under the article. 27 M. 340; *Compare*, 27 M. 343, where it was held that, in a similar case where relief is claimed on the ground of fraud, article 95 would apply.

A.—Suits falling under this article.

(1) Suit for wrongful distraint by landlord:—

A suit for compensation for wrongful distraint of plaintiff's crops by defendant-landlord, under the Bengal Tenancy Act (VIII of 1885). 7 C.W.N. 728.

(2) Suit for compensation for seizure and sale of timber:—

A suit by the holder of a hypothecation-decree, based on a bond hypothecating certain timber, against a simple money-decree-holder, for compensation for wrongful attachment and sale of the timber in execution of the latter's decree. 3 O.C. 340.

(3) Suit for attachment and detention of cattle:—

A suit for compensation for the wrongful seizure and detention of cattle belonging to the plaintiff in execution of a decree obtained by defendant against third parties. 24 W.R. 298.

(4) Suit by defeated claimant:—

A———brought against the decree-holder-purchaser for recovery of compensation for wrongful attachment of his cattle in execution of a decree obtained against the judgment-debtor. 7 C.P.L.R. 77.

B.—Suits not falling within the article.

(1) Attachment and detention of goods:—

A suit for damages for goods first attached, but, on release thereof from attachment consequent on plaintiff's claim, detained by injunction obtained by defendant in a suit brought by the latter, was held to be governed not by this article, but by art. 42. 24 A. 146; *Cf.* 40 P.R. 1881.

(2) Money paid under order of Court:—

Where there is a fund in Court subject to its orders, and the Court orders payment thereof, though under a mistake, the wrong payment cannot amount to 'wrongful seizure' within the meaning of this article. 11 M. 345 (355); 5 C.P.L.R. 9.

1.—'Wrongful seizure.'—(concluded).

B.—Suits not falling within the article.—(concluded).

(3) Suit for recovery of surplus sale-proceeds :—

A suit to recover surplus proceeds of a sale held under Regulation VIII of 1819 (Bengal) wrongfully taken out by defendant, in execution of a decree against a third party, does not fall under this article. 30 C. 440=7 C.W.N. 520 (*dissenting from* 8 B. 17).

(4) Receipt of money under a subsisting decree :—

A receipt of money under a subsisting decree, though that decree may be subsequently reversed, is not *wrongful seizure*. A suit by a surety to recover money which he had realized by summary process under S. 583, Civil Procedure Code, but which defendant intercepted under colour of a decree subsequently reversed, is not governed by this article, but by art. 120. 13 M. 437.

Compare this case and Nos. 2 and 3 *supra*, with 8 B. 17 in heading 2 *infra*.

(5) Compensation for attachment before judgment :—

A suit for compensation for loss occasioned by attachment of goods before judgment is not governed by this article, the attachment in such a case not being wrongful. 19 M. 80=6 M.L.J. 12.

(Compare 21 C. 142 (148), (P.C.)=20 I.A. 160, where it has been held that a party's taking possession of property under a decree or order of Court, though such decree or order is afterwards set aside, is not wrongful seizure; and 23 M. 621 (626) where it has been held that the attachment, by a third party, though under order of Court, will amount to wrongful seizure.

2.—'Moveable property.'

Suit for money :—

A suit for money wrongly taken under a decree is a suit for compensation falling under art. 29, even though a claim is added for damages for loss of gain or interest upon the money. 8 B. 17.

N.B.—Compare this case with Nos. 2, 3 and 4 under heading 1 (B), *supra*.

3.—'Legal Process.'

Process, meaning of :—

(1) The process meant by the article refers to the process under which the seizure takes place; where a fund in Court, subject to its orders, is ordered to be paid out, there is neither a seizure nor a process for seizure. 11 M. 345 (355).

(2) This article is quite general in its terms and it is intended to apply to all cases where the alleged wrongful seizure is made under legal process. 23 M. 621 (626).

30.—*Against a carrier⁽¹⁾ for compensation for losing⁽²⁾ or injuring goods.⁽³⁾ *One year.* When the loss or injury occurs.

(Old Acts)

[Art. 36 of Act IX of 1871. Same as above, except that the words "for compensation" in the present Act are new.

Act XIV of 1859:—No corresponding provision.

Scope of Article.

The article applies only to suits for compensation for loss of, or damage to goods arising from malfeasance, misfeasance or non-feasance independent of contract. 3 M. 107 (110).

1.—'Carrier.'

Carriers by sea :—

-----are within the purview of the article, even though they are not 'common carriers' for the purposes of the Indian Carriers' Act (III of 1865), the operation of which is confined to inland carriers. 3 M. 107; 26 B. 562 (570)=4 Bom. L.R. 447.

2.—'Losing.'

Suits for compensation for non-delivery of goods :—

1. Where, in a suit for compensation for non-delivery of goods entrusted to a carrier by Railway, the defendant pleads limitation under Art. 30, the burden of proving that the goods were lost lies on the defendant: mere non-delivery is no proof of loss. If there be no such proof, the suit will be governed by Art. 49 or 115. 7 B. 478.
2. See 12 C. 477, which was a case of non-delivery of goods by a carrier, and in which a decision similar to that in 7 B. 478 was arrived at.
3. An action against a Railway Company, for loss of goods, is governed by this article, when the suit is founded not on a contract but on a tort. 3 M. 240; 3 M. 107.
4. **But**, if the action were for non-delivery or short delivery of goods founded on a *contract*, article 115 and not this article will apply. *Ibid* and 5 M. 388.

3.—'Goods.'

Loss of money :—

A suit for compensation for loss, in transit, of money *in specie*, despatched by rail is governed by this article. 19 B. 166, *reversing* the judgment in 17 B. 728.

* This and the next article had formerly been in Part V. They were transferred to Part IV by Act X of 1899. The limitation period for the suits has thus been cut down to one year from two years.

- 31.***—Against a carrier for com- *One year.* When the goods ought
pensation for non-delivery to be delivered,
of, or delay in delivering,
goods.

(Old Acts)

[Art. 37 of Act IX of 1871. Same as above, except that the words 'for compensation for non-delivery of, or' in the present Act are new.

Act XIV of 1859.—No corresponding provision :

(Notes)

This article should be read with the next previous article (30) and the case noted thereunder.

PART V.—*Two years.*

- 32.**—Against one who, having a *Two years.* When the perversion
right to use property for first becomes known
specific purposes⁽¹⁾, perverts to the person injured
it to other purposes.⁽²⁾ thereby.

(Old Acts)

[Art. 38 of Act IX of 1871. First two columns—same as above. Third column—
'The time of the perversion'

Act XIV of 1859.—No corresponding provision'.

(Notes)

1. —' Having a right to use property for specific purposes.'

(1) **Tenants :—**

————are persons having a *right* to use property for specific purposes in accordance with the conditions of demise, and suits against them will be governed by this article. 10 A. 634=8 A.W.N. 257 ; 8 A. 446=6 A.W.N. 210. See also 26 C. 564 (F.B.)=3 C.W.N. 464 ; 24 C. 160=1 C.W.N. 223 ; 6 C. 34=6 C.L.R. 569 and 9 C. 147=12 C.L.R. 418 ; 14 A.W.N. 165 (noted under heading 2 *infra*), which are all instances of tenants 'having a right to use property for specific purposes' and perverting the same for other purposes.

(2) **Suit against trespasser :—**

A suit against a *trespasser*, for removal of trees planted on a land belonging to a Zemindar, is governed not by this article, but by art. 120, because a mere trespasser is not a person having *any* right to use property for specific purposes. 10 A. 634=8 A.W.N. 257.

(3) **Having a right. when ? :—**

The words 'having a right to use the property' have reference not to the time when the suit is brought, but to the time when the perversion takes place. 14 A.W.N. 165.

This article (31) has been substituted for the original section by Act X of 1899

2. 'Perverts it to other purposes.'

(1) **Suit for mandatory injunction or ejectment:—**

A ———brought by a landlord against a tenant, under Bengal Act VIII of 1885, to fill up a tank excavated by the latter on land demised for agricultural purposes or, in the alternative, for ejectment, is governed by this article and not by art. 120. 26 C. 564 (F.B.)=3 C.W.N. 461 [overruling 6 C. 34=6 C.L.R. 569 and 9 C. 117=12 C.L.R. 418, and approving 24 C. 160 = 1 C.W.N. 223 (next case)].

(2) **Suit for ejectment and removal of trees:—**

This article applies to a suit under cl. (a) of S. 25 and S. 155 of Bengal Act VIII of 1885 (Tenancy) for ejectment of a tenant and for removal of trees planted by him on land leased for agricultural purposes. Art. 120 does not apply to such a case. 21 C. 160=1 C.W.N. 223, (*distinguishing* 6 C. 634=6 C.L.R. 569 and 9 C. 117=12 C.L.R. 418).

(N.B.)—6 C. 34=6 C.L.R. 569 and 9 C. 117=12 C.L.R. 418 had decided that a suit by a landlord against a tenant for a mandatory injunction, as for filling up a tank or for removal of trees planted or, in the alternative, for ejectment, was governed, not by this article, but by art. 120. These cases have now been *overruled*—see cases Nos. 1 and 2 *supra*).

(3) **Suit for removal of trees:—**

A suit brought by a landlord, against an occupancy tenant for agricultural purposes, for removal of trees planted by the latter on his cultivatory holding, is governed by this article. 8 A. 116=6 A.W.N. 210; 20 A. 519.

(4) **Suit for removal of shed erected during tenancy:—**

A suit by a Zemindar, against an ejected tenant, for the removal of a shed erected during his tenancy, brought more than two years after its erection, is barred by limitation. 11 A.W.N. 165.

33 Under Act No. XII of 1855 **Two years.** When the wrong complained of is done,
(to enable executors, administrators or representatives
* to sue and to be sued for certain wrongs), against an executor, administrator or other representative.

(Old Acts)

Art. 39 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision].

(Notes)

This article should be read with articles 20 and 21 *supra* (pp. 731 & 732) with the notes thereunder.

34.—For the recovery of a wife⁽¹⁾. **Two years.** When the possession is demanded and refused⁽²⁾.

(Old Acts)

[Art. 41 of Act IX of 1871. Same as above.

Act XIV of 1859.—*No corresponding provision.*]

(NOTE).—This article and the next (35) and the Notes thereunder ought to be read together.

1.—‘For recovery of wife.’

Suit against wife, in form, for recovery of wife :—

A suit by the husband, against the wife, though brought in form as a suit for recovery of wife, is, in substance, one for restitution of conjugal rights. To such a suit, article 35, and not this article, is applicable. 23 B. 307.

(NOTE).—The question whether, if the husband and the wife were of full age and sound mind at the time of the demand and refusal, the suit would be absolutely barred after two years, or whether section 23 would apply to such a suit, was left open in this case.

2.—‘When possession is demanded and refused.’

(1) Suit for recovery of wife—Continuous wrong :—

A withholding, by a third party, of the plaintiff's wife is a continuous wrong, and a fresh period of limitation begins to run at every moment of the time during which the withholding continues. 80 P.R. 1892 [*following* 60 P.R. 1879 (F.B.)]; 14 P.L.R. 1903; 11 A.W.N. 18; 16 B. 714; 16 B. 715 (Note).

(2) A suit, whether as against the wife only, who refuses to return to her husband and allow him the exercise of conjugal rights (art. 35), or for recovery of wife as against the person who is retaining her (art. 34), is not taken out of the operation of S. 23 (*See* p. 652 *supra*), the wrong in either case being a continuous one and giving rise to recurring causes of action during the whole time of the wrong. 16 B. 714, 16 B. 715 (Note).

(NOTE).—In this case, the point whether in such cases the demand and the refusal ought to have been made by the parties being of full age and sound mind was not considered.

(3) What is refusal ?—

A positive refusal on the part of the wife cannot be essential to the husband's cause of action. She might always return evasive answers to his demands or silently ignore them; yet the husband may have a cause of action. 23 B. 307 (at p. 310).

(4) Refusal by minor :—

A refusal by a minor does not cause the Statute to commence to run. 23 B. 307 (310). But *see* 28 C. 37 = 5 C.W.N. 195, which held that it is not necessary for the Statute to commence to run that the demand must be to, and the refusal must be by, a husband or wife of full age and sound mind.

2.—‘When possession is demanded and refused.’—(concluded).

(5) Demand and refusal, necessity for:—

It is not necessary, as a condition precedent to suits falling within these articles (arts. 34 and 35), the parties being Hindus, that there should be any demand by the plaintiff and refusal by the defendant. The limitation applicable to suits of the above description is that provided by art. 120, read with S. 23 of this Act. 13 A. 126=11 A.W.N. 18.

35.—For the restitution⁽¹⁾ of conjugal rights. **Two years.** When restitution is demanded, and is refused by the husband or wife, being of full age and sound mind.⁽²⁾

(Old Acts.)

[Art. 42 of Act IX of 1871.—Columns 1 and 2—same as above; Column 3—when restitution is demanded and refused.

Act XIV of 1859.—No corresponding provision.]

(Notes)

~~13~~ Besides the cases noted below, the cases in the Notes under the next previous article may also be referred to with advantage.

I.—‘Restitution.’

(1) Maintainability of suit:—

(a) A suit for restitution of conjugal rights will lie notwithstanding the fact that there was no consummation of marriage before suit. 10 B. 301; 28 C. 37 (46).

(b) A suit, even against a minor wife, for restitution of conjugal rights is governed by this article, and time would run even in such a case. It is not necessary that the demand must be to, and the refusal must be by, a wife of full age and sound mind. 28 C. 37 (45, 46)=5 C.W.N. 195: [But see 23 B. 307 and Cf. 13 A. 126].

(2) Suit, in form, for recovery of wife:—

—See 23 B. 307 at p. 742 *supra*, under art. 34.

2.—‘Being of full age and sound mind.’

A suit for restitution of conjugal rights would be barred, after two years from the date of demand by one of the married parties and refusal by the other, if, when such demand and refusal had been made, the parties were of full age and sound mind. To a case where such a demand and refusal have been made, this article and not section 23 would apply. 25 B. 644 (F.B.)=3 Bom. L.R. 371 (F.B.).

(NOTE).—This was a case between parties under the Parsi Marriage and Divorce Act (XV of 1865).

- 36.** - For compensation for any *Two years*. When the malfeasance, misfeasance, or nonfeasance independent of contract, and not herein specially provided for.

(Old Acts)

[Art. 49 of Act IX of 1871. For compensation for any wrong, malfeasance, nonfeasance or misfeasance independent of contract and not herein specially provided for—Two years—When the wrong is done or the default happens.

Act XIV of 1859 No corresponding provision.

(Notes)

Scope of article.

- (1) **Proceedings under S. 214, Act VI of 1882 :** -

(a) The article is inapplicable to an application, by an official liquidator, under S. 211, Indian Companies Act, to compel the directors to repay money misapplied—the article being applicable only to suits and not to applications. 19 M. 149.

(b) This article has no application to the special proceeding provided for by ———. 18 A. 12=15 A.W.N. 136.

- (2) **Burden of proof :** -

Where a defendant sets up a statutory bar under this article, the burden of showing that the suit comes clearly under this article rests on him. *Per* MACLEAN C.J., in 25 C. 692 (F.B.)=2 C.W.N. 265.

1. 'Malfeasance, misfeasance or non-feasance.'

- (1) **Definition :** -

The words — are equivalent to, and have the same significance as, the word 'tort.' The words — have the widest import and embrace all possible acts or omissions commonly known as 'torts' by English lawyers. 11 B. 133 (135).

- (2) **False complaint—Detention of goods :**

See 7 B. 427, under art. 23, at p. 734, *supra*.

- (3) **Suit for money embezzled :** -

A suit, by a Municipal Council against its late Chairman, to recover the money embezzled by the Manager, during the tenure of defendant's Chairmanship, is governed by this article; articles 89 and 90 not being applicable, since there was no relationship of principal and agent between the Council and the defendant. 22 M. 342.

- (4) **Attachment before judgment :—**

(a) A suit for compensation for an attachment before judgment, is governed by article 49, rather than by this article, the attachment not being wrongful. 19 M. 89=56 M.L.J. 12.

(Note).—See the same case noted under art. 29 *supra*, at p. 738, *supra*.

Scope of article.—(concluded).

1.—'Malfeasance, misfeasance or non-feasance.'—(concluded).

(b) A suit for damages, as compensation for an attachment, before judgment, of certain rubies, would be governed by this article. 6 Bom. L.R. 704.

(NOTE).—In this case it was held that in a suit for compensation brought under art. 36, S. 23 of the Act would be applicable if the damages caused by the tort were nil or a negligible quantity but for the continuance of the injury voluntarily caused or permitted by the tortfeasor. — See p. 709.

Compare 19 M. 80, *supra*.

(5) Suit for damages for loss of ship by collision :—

A suit to recover damages for the loss of a ship caused by collision at sea is an action of tort founded upon negligence, and is governed by this article. 11 B. 133.

(6) Suit against shebait personally :

A suit, by the sons of a deceased shebait of a *debutter*, for the recovery of advances made by the deceased on account of the *debutter* estate, at a time when he had been wrongfully kept out of office by the defendant, who claimed the office as against the deceased, would be governed by this article, if the suit were framed as one against the defendant *personally*; if the suit were framed as one against the defendant as representing the *debutter* estate, it would be governed by art. 120. 5 C.W.N. 273.

See, further, Nos. 2, 3, 4, 5, 6, 7, 8 and 9, under heading No. 3 'Not herein specially provided for,' *infra*.

2.—'Independent of contract.'

(1) The article applies only to suits for compensation for tortious acts independent of contract. 10 B. 214 (218)

(2) Suit for compensation by auction-purchaser against decree-holder :—

A ———, for damages for misdescription of property advertised for sale and subsequently sold in auction and purchased by the plaintiffs, is not governed by this article, since the suit is one based on a contract of sale. 10 B. 214 (218). Compare 2 B. 258.

(3) Waiver of tort and recovery of money :—

A plaintiff may waive a tort committed by the defendant and sue for money recovered by the defendant as the result of the tort. 5 M.H.C. 200 and 11 M. 269 (271).

(NOTE).—To such a suit, the limitation provided by this article may apply.

(4) Suit for continuing damage :—

———See 18 C. 91 (98), Note No. 17 at p. 657, *supra*.

3.—‘Not herein specially provided for.’

(1) **Intention of article :—**

(a) This is a general article applying to all cases of torts not specially provided for in the other articles in the schedule. It will be inapplicable to a suit clearly coming within any other article. 24 A. 368 (369).

(b) The intention of the Act appears to be, that not more than two years should be allowed for bringing a suit founded on a tort, except in certain well-defined particular instances. This will be plain, when this article and article 115 are read together. 11 B. 133.

(2) **Suit by one joint tenant against another :—**

A suit for compensation, by some joint tenants against others, for the latter's exclusive enjoyment of part of the joint lands, is governed by article 120, and not by this article. 23 C. 799.

(3) **Profits of hereditary office wrongfully received :—**

A suit for the recovery of profits of a hereditary office wrongfully received and withhold, is governed by art. 120, and not by this article. 9 M.L.J. 163.

(4) **Suit for money had and received by defendant for plaintiff's use :—**

A suit by a landlord for recovery of his share of compensation, allowed by Government for acquisition of land under Act X of 1870, the same being realized by the defendant-tenant, representing himself to be the owner, is governed, not by this article, but by article 62 or 120. 3 C. W.N. 202.

(5) **Suit for damages for fraud :—**

A suit for compensation for damages caused by a fraud practised by defendant, in fraudulently getting a Court-seal to be placed on the outer door of a warehouse, and thus preventing the plaintiff from taking possession of the goods therein, would not be governed by art. 29 or this article, but by art. 95. 27 M. 343.

(6) **Sale by mortgagee of property not mortgaged :—**

A suit for compensation for sale, by a mortgagee, of property not mortgaged but stored in the mortgaged premises, under pretence of a power of sale contained in the deed of mortgage, is not governed by this article, but by art. 49. 11 M. 333.

(7) **Suit for meane profits :—**

A suit for profits of immoveable property belonging to the plaintiff, but wrongfully taken by the defendant under a decree against plaintiff afterwards set aside on appeal, is not governed by this article, such a case being specifically provided for by art. 109. 4 C. 625.

(8) **Damages for cutting and carrying away or misappropriating crops :—**

A suit for——— does not fall under this article, there being other specific articles governing the case, such as articles 39, 48, 49 or 109. 25 C. 692 (F.B.)=2 C.W.N. 265; 22 C. 877. *Contra—per RAMPINI, J., Ibid.*

Compare 4 C. 605=2 C.L.R. 526.

3.—*Not herein specially provided for.*—(concluded).

(9) Compensation for trespass on immoveable property :—

A suit for compensation for loss of crops caused by defendant's unlawfully taking possession of plaintiff's well can be brought within three years from the cessation of the trespass. This was a case of a continuing wrong within the meaning of S. 23 *supra* : but the damages were held recoverable only for the three years next preceding the suit. 6 M. 176.

See, further, cases noted under Nos. 3, 4 and 6, heading No. 1, *Malfeasance &c., supra*.

PART VI.—*Three years.*37.—For compensation for obs- *Three years.* The date of the obstructing a way or a water-
course. obstruction.

(Old Acts.)

[Art. 31 of Act IX of 1871.—For obstructing a way or a watercourse—Two years—The date of the obstruction.

Act XIV of 1859.—No corresponding provision.]

(NOTE).—This article and the next may be read together.

(Notes)

(1) Obstruction to a watercourse :—

An———being a continuous act of wrong, as to which the cause of action accrues *de die in diem*, a suit for compensation for such obstruction would not be barred even though brought more than two years from the date of the obstruction. S. 23 applies to such cases. 6 C. 394 (P.C.)—7 I.A. 240—7 C.L.R. 529.

(2) Suit for recovery of land and opening a watercourse :—

A———belonging to the plaintiff and closed by the defendant is governed by the twelve years' limitation contained in art. 144, and not by this article. 4 W.R. 107.

(3) Suit for declaration of prescriptive right :—

A———to irrigation from a running stream, and for damages caused by the stoppage, by defendant, of water higher up the stream, was governed by the twelve years' limitation. W.R. Sup. Vol. 106.

(4) Compensation for trespass on immoveable property :—

(a) A suit for———is governed by art. 39, and not by this article or art. 40. 6 M. 176. (Note).—See same case under art. 36.

(b) So, also, a suit to recover damages for loss of crops caused by defendant's interference with the plaintiff's right to the flow of water from a canal. 3 M.H.C. 111.

(5) Diversion of a watercourse :—

The———is a continuous injury giving rise to a cause of action from day to day as long as the diversion continues. Such a suit, even though brought more than two years from the date of the diversion, would not be governed by this article, but by S. 23 *supra*. 5 M.H.C. 6.

38.—For compensation for divert- *Three years.* The date of the divert-
ing a watercourse. version.

(Old Acts.)

[Art. 32 of Act IX of 1871. For diverting a watercourse—'Two years—'The date of the diversion.

Act XIV of 1859.—No corresponding provision.]

(Notes)

See cases noted under art. 37, *supra*.

39.—For compensation for tres- *Three years.* The date of the tres-
pass upon immoveable pro- pass.
perty⁽¹⁾.

(Old Acts.)

[Art. 43 of Act IX of 1871.

Same as above, except that the words 'For compensation' were not found in the 1st column; and there were the words "when the trespass takes place" instead of the words to be found there in the present article in the third column.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Suits in ejectment :—

The article is inapplicable to———. It applies only to suits for damages on account of trespass. 6 B. 580; 9 W.R. 602.

(2) Right to a jalkar :—

A——— is interest in immoveable property, and not an easement. A suit for declaration in respect of such a right was held to fall under art. 145 of the old Act corresponding to art. 144 of this Act. 3 C. 276.

(3) Suit to have drain constructed by defendant closed :—

A suit to have a drain constructed by defendant upon plaintiff's land closed, is one relating to a continuous wrong giving rise to causes of action from day to day, and is governed by S. 23 *supra*. 24 W.R. 97.

(4) Suit for declaration and injunction :—

A suit for a declaration that the plaintiffs have a right of entry and worship in the sanctuary of a temple, and for an injunction restraining the defendants from interfering with such right, does not come under this article. The suits contemplated by this article are those for damages. 7 B. 323.

1. — 'For trespass on immoveable property.'

(1) Trespass :—

Forceful entry by the owner having a present right to possession is not an actionable trespass. (*Mitra on Limitation*, 4th Edition, at p. 832).

1.—‘For trespass on immoveable property.’—(concluded).

In ejectment, the plaintiff's cause of action is not dependent on the original act of dispossession. What gives the plaintiff his cause of action is the wrongful detention of the land, which is his—not the taking of it. 29 C. 871 (*Per HILL and BRETT, JJ.*, at p. 883), *Mitra on Limitation*, 4th Edition, at p. 832).

(2) Trespass and dispossession :—

Fishing in plaintiff's tank or lake without his permission is an act of trespass only, when the plaintiff is *not* prevented from fishing there. 3 C.L.R. 509. But the acts of the defendant in taking fish from the plaintiff's *julkar* cannot be considered successive acts of trespass, if they appear to have been exercised *continuously* under a claim of right. They must be considered as a dispossession of the plaintiff's right *pro tanto*. 3 C. 276.—See *Mitra's Limitation* (4th Edition), p. 832.

(3) Compensation for seizure of a well :—

—————See 6 M. 176, under art. 36 at p. 747 *supra*.

(4) Damages for cutting and carrying away crops :—

(a) A suit for ————comes under this article, such a suit being one for compensation for trespass on immoveable property. 25 C. 692 (F.B.) at p. 699=2 C.W.N. 265.

(b) Where the suit is regarded as one for compensation for the wrongful act on the part of the defendants in cutting the crops on the plaintiff's land, it will be governed by this article. If it is regarded as a suit for damages for carrying away and misappropriating the crops, it would fall under art. 49. *Per Ghose, J.* in 22 C. 877.

40.—For compensation⁽¹⁾ for in- **Three years.** The date of the infringing copyright⁽²⁾ or fringement. any other exclusive privilege⁽³⁾.

(Old Acts.)

[Art. 11 of Act IX of 1871.—Same as above except, that the words ‘For compensation’ in the first column, in the present article, are new, and the period of limitation was one year and not three years as in the pre-sept article.

S. 1, cl. 2 of Act XIV of 1859.—To suits for damages for the infringement of copyright or of any exclusive privilege—the period of one year from the time the cause of action arose].

(Notes)

1.—‘For compensation.’

Suit for injunction :—

A ———— to restrain a piracy of copyright by sale of a book published more than a year before suit, is not barred by this article or by 5 & 6 Vic., ch. 45, S. 26. (17 C. 951, *Mitra's Limitation*, 4th Edition, p. 833).

2.—‘When the injunction ceases.’

Commencement of time :—

In a suit for damages for the defendant's wrongfully obtaining an injunction, the time of the accrual of the cause of action to the plaintiff is the date of the damage resulting to him ; and the cause of action will continue as long as the injunction lasts. 13 W.R. 305=5 B.L.R. at p. 4.

- 43.—Under the Indian Succession Act, 1865, section 320 or 321, “or under the Probate and Administration Act, 1881, section 139 or 140,” to compel a refund⁽¹⁾ by a person to whom an executor or administrator has paid a legacy or distributed assets. *Three years.* The date of the payment or distribution.

(Notes)

1.—‘To compel a refund.’

Suit against executor personally :—

A suit by a legatee claiming under the will of a testator, to recover his legacy from the executors under the will, personally, on the ground of waste of assets, would be governed by art. 128, and not by this article. 19 M. 425 (432).

- 44.—By a ward who has attained *Three years.* When the ward attains majority, to set aside⁽¹⁾ a sale majority. by his guardian.

(Old Acts)

[There was no corresponding article in either of the earlier Acts].

Scope of article.

- (1) *Quere.*—Whether this article applies to a guardian *de facto*, as well as to a guardian *de facto* and *de jure*? 57 P.R. (1891).
- (2) This article provides a special period of limitation for removal of obstacles to a plaintiff's obtaining possession. He cannot, therefore, ignore that provision and come into Court more than three years after his attaining majority and within 12 years of the alienation. Such a suit will be governed by this article or article 91 or article 92, even though there is no prayer for setting aside the alienation. 57 P.R. 1891, 19 P.R. 1902=183 P.L.R. 1901.
- (3) If the transaction is null and void so far as the plaintiff is concerned, he may treat it as null and void and non-existent, and may avail himself of the longer period of limitation of twelve years in bringing a suit for possession. If, however, the transaction is one which the ward cannot ignore, he cannot recover possession without setting it aside. To the former class of cases this article will not, and to the latter it will apply. 57 P.R. 1891.

Scope of article.—(concluded).**(4) Suit on ground of fraud :—**

The article is inapplicable to a suit to set aside a deed of gift of immoveable property on the ground of fraud and undue influence. 15 C. 58 (P.C.) = 14 I. A. 148.

I.—‘To set aside.’**(1) Cancellation of alienation and possession :—**

A suit to cancel an alienation made by the guardian of the plaintiff while the latter was a minor, and to recover possession of the property comprised in the instrument, would not be governed either by this article or 91, but only by art. 142. 5 A. 490 = 3 A.W.N. 647.

(2) Suit for redemption :—

Where the guardian of a minor sells the equity of redemption to the mortgagee, a suit for redemption brought by the ward more than three years after attaining majority will not be barred by this article, as the necessity for impugning the sale does not arise till the right to redeem is resisted. 14 B. 279.

(N.B.)—But see the observations of the Privy Council on this decision at 25 B. 387 (at p. 351) (P.C.).

(3) Sale by Hindu widow—Next heir a minor :—

Where a Hindu widow makes certain alienations and dies, and at her death, the next heir is a minor, a suit to set aside her alienations can be brought by such heir within three years of his attaining majority. 4 C. 523 = 3 C.L.R. 391.

(4) Alienations by other guardians :—

(a) Alienations, by a guardian, of his infant's estate are void, and are not binding on the infant except in so far as they can be shown to have been made for his benefit, or made under circumstances otherwise rendering them binding on him. 7 M.L.J. 131.

(b) A suit by a minor, who has attained majority, to recover possession of properties alienated by his guardian by a deed executed under circumstances not binding on him, is not governed either by article 44 or article 91 of Schedule II of the Limitation Act, as it is unnecessary for him to get the deed cancelled or set aside as a condition precedent to his recovering possession. 7 M.L.J. 131.

(5) Suit for possession :—

(a) A suit by a person to recover possession of land sold by his guardian, during his minority, without legal necessity, is governed by this article. 3 C.W.N. 278.

(b) A suit to recover possession of property, after cancellation of a sale made by the guardian of the plaintiff during the latter's minority, would be governed by this article if the guardian were a lawful guardian. If not, it would be governed by art. 144. In the former case, the alienation would bind the minor until it is set aside; whereas, in the latter, the minor would not be bound; he may treat the sale as non-existent. 8 A.W.N. 152.

I.—To set aside.—(continued).

(c) A ——— brought by a ward, on attaining majority, for possession of property alienated by his guardian during his minority, would be governed by this article, if the minor cannot recover without setting aside the alienation. 1 C.P.L.R. 75; 19 P. R. 1902, 57 P.R. 1891;

Compare Nos. 1 and 2 under the heading, **Scope of article** at p. 725 and those under heading **B** at pp. 726 to 728, *supra*.

(6) **Power of guardian to alienate :—**

It is not within the powers of a guardian to make a voluntary alienation in perpetuity of his ward's immoveable property. It is open to the ward to challenge the validity of such a transaction. 28 A. 394 (P.C.)=28 I. A. 190.

(Note).—To such a suit this article may apply.

EXAMPLES OF VOIDABLE ALIENATIONS.

(1) **Contract by minor :—**

A contract entered into by a minor. 18 C. 259 (263); 13 W.R. 166; 10 B.L.R. 326 (Note); 13 W.R. 172; 10 B.L.R. 327 (Note); 3 W.R. 10; 3 B.L.R. A C. 426; 11 C. 552.

But see now 30 C. 539 (P.C.)=7 C.W.N. 441=5 Bom. L.R. 421 which has settled the question authoritatively by deciding that such a contract is absolutely void.

(2) **Mortgage by guardian without Court's sanction :—**

A mortgage by the mother and certificated guardian of a minor, without the Court's sanction, is not void but voidable, and the minor will be liable to the extent to which his estate has been benefited by the transaction. This article would apply to a suit by the minor to set aside the mortgage. 25 A. 59; 9 A. 340; 22 M. 269. But see 25 C. 909, which holds that such a sale is absolutely null and void: Compare 7 C. W.N. 681 (P.C.)=25 A. 407=5 Bom. L.R. 478, where it has been held that, the guardian alienating being one appointed by the Court, and other circumstances rendering the transaction valid existing, mere want of sanction would not render it invalid.

(3) **Alienations by Mahomedan guardians :—**

It is only *new* guardians, under the Mahomedan Law, that are competent to alienate a minor's properties, so as to bind him. 65 P.R. 1893.

(4) **Alienation by *de facto* guardians :—**

Under the Mahomedan Law, and in the absence of a special custom to the contrary, a *de facto* guardian, not being a natural guardian nor one appointed by the Court, can bind a minor by an alienation for the benefit of a minor or for discharging his father's debts. 26 A. 22=A. W.N. (1908), 183; 45 P.R. 1889; Cf. 52 P.R. 1904=85 P.L.R. 1904.

But see 5 O.C. 197, which holds that such a transaction confers no title whatever. Compare 27 M. 10.

1.—'To set aside.'—(concluded).

(5) Alienation by Hindu guardian :—

A sale by a *de facto* and natural guardian is not a nullity. It is only voidable at the instance of the minor. 7 O.C. 181.

See cases noted under art. 91 *infra*.

EXAMPLES OF VOID ALIENATIONS.

(1) Contract by minor :—

A contract entered into by a minor is void. Where such a contract is declared to be such by a Court, the minor is not even bound to return the money advanced to him under it. 30 C. 539 (P.C.)—7 O.W.N. 441.

N.B.—To a suit to set aside such a contract, or to recover property irrespective of such a contract, this article may not apply.

(2) Suit for possession :—

Where land belonging to a minor is taken up by Government under the Land Acquisition Act, the guardian has no power to waive a right to compensation. Where such a waiver has been made, the minor may, on attaining majority, sue for possession of the property. 18 C. 99 (P.C.)—17 I.A. 90.

N.B.—To such a suit this article may not apply.

(3) Sale by a certificated guardian—Court's sanction :—

(a) A sale by a certificated guardian in excess of his powers cannot bind a minor. The fact that the Court, on the representations of the guardian, sanctioned the sale, would not alter the case. This article would not apply to a suit, by the ward on attaining his majority, for the recovery of property alienated, it not being incumbent on the minor to sue to set aside the transaction. 5 C. 363 (370).

(NOTE).—This was a case under Act IX of 1871, in which there was no provision corresponding to this article.

(b) An unsanctioned alienation by a certificated guardian in excess of the powers contained in S. 18 of Act XL of 1858. 18 C. 259; 15 C. 40.

General.

(4) Alienation not binding plaintiff's interest :—

An alienation, which is void, so far as the interests of the plaintiff in the alienated property are concerned, need not be set aside. The plaintiff may recover the property on the ground of his title by availing himself of the longer period of limitation allowed by art. 144. To such a suit this article will not be a bar. 12 C. 69 (*following* 6 I. A. 110.)

(5) Sale by guardian without necessity :—

A suit by a minor who has attained majority, to recover possession of properties alienated, without necessity, by his guardian by a deed, is not governed by art. 44 or 91, as it is unnecessary for him to get the deed cancelled as a condition precedent to his recovering possession. 7 M.L.J. 181.

(6) Sale by person purporting to be, but not in fact, a guardian :—

This article is inapplicable to a suit by a minor, on attaining majority, to set aside a sale by a person purporting to act as, but not in fact, a guardian. 135 P.R. 1892.

General.—(concluded).

(7) Alienation by Mahomedan mother :—

An——— of a minor, the mother not professing to be either the *de jure* or *de facto* guardian, is absolutely void. 6 C.W.N. 667.

To a suit by the minor to set aside such a transaction, or recover the property, this article will not apply.

(8) Liability to reimburse :—

In a suit by a ward, after attaining majority, to set aside a sale by his guardian, the ward must reimburse the defendant to the extent to which he has been benefited by the transaction. 9 A. 340.

2.—‘Sale.’

For purposes of this article, a sale in execution of a decree obtained against the minor as represented by his guardian is not a ‘sale.’ 4 M.L.J. 152.

45.—To contest⁽¹⁾ an award⁽²⁾ within **Three years.** The date of the final order any of the following Regulations of the Bengal award⁽³⁾ or order in the case.
Code :—VII of 1822, IX of 1825, and IX of 1833.

(Old Acts.)

[Art. 44 of Act IX of 1871.—Same as above.

S. 1, cl. 6 of Act XIV of 1859.—Same as above].

(Notes)

Scope of article.

(1) Suit for redemption :—

Where, in settlement-proceedings, the mortgagor and the mortgagee contest against each other the right to settlement, and the settlement is made with the mortgagee, the mortgagor's suit for redemption would be barred after three years from the award of the settlement. To such a case this article would apply. 9 W.R. 564.

(2) Suit to vary boundaries :—

A suit to vary the boundaries laid down by a survey-award falls within this article. W.R. (1864), 38.

(3) Award under Act XIX of 1873 (N.W.P.) :—

(a) A suit to contest orders under———does not fall under this article. 1 A.W.N. 15.

(b) Suit by co-sharer for possession of trees and to set aside order of the Settlement-officer made in favor of defendants—See 1 A.W.N. 91 at p. 727 *supra*.

(c) A suit, otherwise barred by the law of limitation, cannot be saved from the bar of limitation simply because it is brought within three years from the date of an award under this article. 8 W.R. 209.

Scope of article.—(concluded).

(4) Butwara proceedings:—

A suit to avoid———of a Collector, is governed not by this article, but by art. 120. 16 W.R. 271.

(5) Separate rights and interests—Appeal by some:—

Where the rights and interests of certain persons in a land are distinct and separate, an appeal against a survey-award in respect of the interests of some only of the parties would not prevent limitation from running, as against others, from the date of the award. 1 B.L.R.A.C. 12=10 W.R. 48.

(6) Suit for cancelment of award and recovery of possession:—

(a) A———does not fall under this article, the latter relief being governed by the 12 years' limitation. 10 W.R. 71 - 1 B.L.R. (A.C.), 25.

(b) The article is inapplicable to an order under Act XIX of 1879 (N.W.P.) 2 A.W.N. 131.

1.—'To Contest.'

Order under Regulation VII of 1822:—

An———will not bind a person not a party to the settlement-proceedings, nor debar him from suing, on his own title, for recovery of possession of the lands covered by the order, after the expiry of the period of limitation provided by this article. 5 C.L.R. 452.

2.—'Award.'

(1) Definition:—

(a) The term 'award' means an adjudication of rights between rival claimants, made by a Revenue officer under the judicial powers conferred on him by the Regulations mentioned in the article. 2 N.W.P.H.C. (A.C.) 226.

(b) An assessment made by a Collector for revenue or rent is not such an award. *Ibid.*

(2) Requisites for an award:—

An award supposes a contest between the parties, a *bona fide* contention and decision after a proper investigation into the points at issue between them. 11 W.R. 889.

(3) What is an award?—(Regulation VII of 1822):—

An order of a Settlement-officer, to whom a case is referred by the Assistant Settlement-officer, ordering the names of all the claimants to be substituted for that of the deceased, would not constitute an award, when it is passed, not on evidence taken before him, but on evidence recorded by his Assistant and without having given the parties notice to establish their claims before him: i.e., when he has not acted as a Court of Judicature. 8 A. 738 (743)=1 A.W.N. 48.

Compare 1 A.W.N. 91, which holds that, where plaintiff is not a party to the proceedings before the Settlement-officer terminating in an award, he is not barred from instituting a suit, because he is not bound by the award.

2.—‘Award.’—(concluded).**(1) Award where fact of possession not disputed :—**

The finding of a Survey Deputy Collector that a party had been in possession of certain land for more than a year, where the fact was not disputed, could not amount to a “summary award” under Reg. VIII of 1822, and a suit for the recovery of the land held not to fall under the article. 11 W.R. 389.

(5) Orders of an executive character :—

(a) The article applies only to a judicial award, and not to a determination by the Revenue Courts of a purely executive character. 3 C.W.N. 99.

(b) An order made by a Settlement-officer in an enquiry regarding a Zemindar's claim for cess is not an order of the nature contemplated by the section. 2 N.W.P.H.C. 425.

3.—‘The date of the final award.’**(1) Order under Act XIX of 1873 (N.W.P.) :—**

The decision of a Settlement-officer on a question of title is not ‘final.’ Such an order, when it is one under Act XIX of 1873, does not come within the purview of the present Act. 1 A.W.N. 15.

(2) Commencement of time :—

In a suit to contest an award of a Survey Deputy Collector, the period of limitation begins to run, where there has been an appeal to the Commissioner and Board of Revenue, from the date of the order of the latter. 10 W.R. 51=1 B.L.R. (A.C.) 10.

General.**(1) Maintainability of suit :—**

Though zemindari cesses cannot be collected until recognized and sanctioned by the settlement-authorities, there is nothing in Regulation VII of 1822 or Act XIX of 1873 (N.W.P.) to preclude Civil Courts from taking cognizance of suits seeking a declaration of zemindari rights to such cesses. 1 A. 373.

(2) Service of notice of survey-proceedings :—

Where notice of the survey-proceedings was served on the joint proprietors of an undivided estate, though not individually on the members, an individual co-proprietor would be bound by the survey-award and settlement, to which the other proprietors were parties. 3 W.R. 7.

(3) Investment of title :—

The settlement of an estate by the Settlement-officer in a person's name cannot invest that person with a title to the estate which he has lost by limitation. 10 W.R. 249.

(4) Suit to establish right to settlement :—

A———under Reg. VII of 1822, and to reverse an order of the Revenue-authorities in favor of defendant, must be brought within twelve years from the date of the order. 6 W.R. 218.

- 46.**—By a party bound by such *Three years.* The date of the final award⁽¹⁾ to recover any property⁽²⁾ comprised therein. award⁽³⁾ or order in the case.

(Old Acts.)

[Art. 45 of Act IX of 1871.—Same as above.

S. 1, cl. 6 of Act XIV of 1859.—To suits brought by any person to contest the justice of an award which shall have been made under Regulation VII of 1822, Regulation IX of 1825, and Regulation IX of 1833, of the Bengal Code, or to recover any property comprised in such award—the period of three years from the date of the final award or order in the case.]

(Notes)

1.—‘By a party bound by such award.’

- (1) A suit by a person, who was not a party to a survey-award, but who purchases the property dealt with by the award, subsequent thereto, at a sale for arrears of Government-revenue, is not governed by this article. 9 W.R. 165.
- (2) A person not a party to an order of the Board of Revenue under Regulation VII of 1822, will not be debarred from bringing a suit for possession under the general law of limitation. 5 C.L.R. 452.
- (3) An award, to fall under this article, must be an adjudication, by the Collector, of the rival claims of parties contesting their claims before him. Such an award becomes final unless contested by a suit under this article. But an order of a Collector, declaring a certain person to be the proprietor and directing his name to be registered as such, without holding a judicial investigation and inviting opposition, if any, is not an award necessitating cancellation. 41 P.R. 1881.
- (4) ——— See 41 P.R. 1881, under article 45.
- (5) The award referred to in this article is an award under the Regulations referred to in the previous article (45). An award passed in a civil suit is not one coming under the article. 25 P.R. 1883.

2.—‘To recover any property.’

(1) Suit for confirmation of title :—

A person, who remains in possession for more than three years from the date of an award, is not debarred, by S. 1, cl. 6 of Act XIV of 1859 (=art. 45 of the present Act), from maintaining a suit to confirm his title. 10 W.R. 22=1 B.L.R.A.C. (1).

(2) Suit to amend thakbust map :—

A ——— made under Regulation VII of 1822 and IX of 1825, must be brought within three years, whether plaintiff is legally bound by it or not. 10 W.R. 22=1 B.L.R. (A.C.) 1.

2.—‘To recover any property.’—(concluded).

(3) Prayer for setting aside award, a surplusage :—

Where the suit is for recovery of possession and a prayer therein for cancellation of an award is a mere surplusage, this article would not apply and bar the suit. 6 W.R. 75.

(4) Suit for possession :—

The order of a Settlement-officer to record the name of a certain person in the Proprietor's Register in reference to a certain land is an ‘award’ under this article. A suit, therefore, to recover possession of the land covered by the order, is governed by this article. 5 N.W.P.H.C. 78.

(5) Suit to set aside award and recover possession :—

A suit to set aside a survey-award and to recover possession of land from which the plaintiff is dispossessed, is not governed by this article, but by the twelve years’ rule. 1 B.L.R.A.C. 25.

3.—‘The date of the final award.’

- (1) When a survey-award relates to land belonging to parties, whose rights and interests are distinct and separate, and one of the parties appeals against the award, limitation runs against the other party not from the date of the decision in appeal, but from the date of the survey-award. 10 W.R. 48=1 B.L.R.A.C. 12.
- (2) Where an award of a Deputy Collector is successively appealed against to the Commissioner and Board of Revenue, the date of the order of the Revenue Board will be the starting point of limitation for a suit under this article. 10 W.R. 51=1 B.L.R.A.C. 11.

General.

- (1) The Court may go behind the settlement-proceedings, and find that the settlement-holder holds in trust for himself and others. 14 C. 493 (P.C.)=14 I. A. 37; 3 C. 522 (P.C.)=4 I. A. 178.
- (2) Zemindari rights are not extinguished, but are only in abeyance during periods of temporary settlement; and possession under a permanent settlement is adverse from the date on which the permanent settlement is made. 22 W.R. 520.

See 10 W.R. 71 under art. 45.

8 W.R. 209——See under art. 45. Cf. 10 W.R. 249.

2 N.W.P. 425——See under art. 45.

47.—By any person bound by an order respecting the possession of property⁽¹⁾ made under the Code of Criminal Procedure, Chapter XII, or the Bombay Mamlatdars’ Courts Act⁽²⁾, or by any one claiming under such person⁽³⁾, to recover the property comprised in such order⁽⁴⁾. *Three years.* The date of the final order⁽⁵⁾ in the case.

(Old Acts.)

[Art. 46 of Act IX of 1871.—Same as above, except that, instead of the words “the Code of Criminal Procedure, Chapter XII or the Bombay Mamlatdars’ Courts Act,” in col. 1, we find in the old Act “Act No. XVI of 1838, section one, clause 2, or Act No. XXV of 1861, chapter XXII, or Bombay Act No. V of 1864.”]

S. 1, cl. 7 of Act XIV of 1859.—*To suits by any party bound by any order respecting the possession of property made under cl. 2, Sec. 1, Act XVI of 1838, or Act IV of 1840, or by any person claiming under such party, for the recovery of the property comprised in such order—the period of three years from the date of the final order in the case.]*

(Notes)

Scope of article.

Scope of order by Magistrate:—

- (a) Orders by Magistrates under Chapter XII, Criminal Procedure Code, are only Police orders made to prevent breaches of the peace. They do not decide any questions of title. 6 C.W.N. 386 (F.C.)=29 C. 187.
- (b) This article contemplates a right to sue in ejectment being in existence at the time of the passing of an order under S. 145, Criminal Procedure Code: (i.e.) it only bars those parties to the order, who, at the date of it, had a right to eject the successful party in the proceedings in the Criminal Court. 19 C. 646.
- (c) The article is applicable to immoveable as well as moveable property. 6 C. 709=8 C.L.R. 154.
- (d) The article will not bar a suit by a person, whose plaint has been rejected by the Mamlatdar's Court, for possession on the ground of title—a suit on title being outside the jurisdiction of a Mamlatdar. 6 Bom. L.R. 612=28 B. 601 (F.B.).

1.—‘Respecting the possession of property.’

Cases of attachment:—

- (1) This article is applicable only to a case in which a Magistrate, under S. 145 of the Criminal Procedure Code, confirms the possession of either party, and not to a case where, acting under S. 146, he attaches the property. 26 M. 410.
- (2) An order under S. 146, Criminal Procedure Code, attaching the property in dispute is not one———, and therefore, does not fall under this article. 20 A. 120=17 A.W.N. 214; 1 M. 909; 4 N.W.P.H.C. 65.
- (3) Whether this article will apply to a case where an order is passed under S. 146 of the Criminal Procedure Code, attaching the property, is an open question. 28 C. 86=5 C.W.N. 160.

2.—‘The Bombay Mamlatdars’ Courts Act.’

(1) Act III of 1876 (Bombay) S. 13 :—

A suit to recover possession of property in respect of which an order is passed under S. 13 of the Mamlatdars’ Courts Act (Bombay Act III of 1876), dismissing the suit for default, falls under this article. 25 B. 82=2 Bom. L.R. 680 (*following* 6 B. 477).

(2) Suit by person failing in Mamlatdar’s Court but succeeding in Civil Court :—

Where a person, who fails as to possession in the Mamlatdar’s Court but succeeds subsequently in the Civil Court, is dispossessed by one claiming through the defendant in the above suits, a suit by the former for possession would not be governed by art. 47. 20 B. 270.

(3) Contract dissolving Mamlatdar’s order :—

Where a contract, between the parties, dissolved a Mamlatdar’s order in a possessory suit and rendered a suit to set aside such order unnecessary, a suit based on such contract would not be governed by this article. 28 B. 525=1 Bom. L.R. 35.

(4) Suit in personal capacity—Suit by Plaintiff as Manager of mutt :—

The possessory suit by the plaintiff in his personal capacity having been dismissed, a second suit in a Civil Court, in his capacity as Manager of a mutt, for recovery of property and rent, held not barred under this 28 B. 215=5 Bom. L.R. 932.

3.—‘Or by any one claiming under such person.’

(1) Lessee and lessor :—

A lessor cannot be said to be claiming under his own lessee. 11 C.L.R. 122 ; 24 W.R. 128 ; 11 C. 562. A criminal proceeding, therefore, between the lessee and a third party under Chapter XII, Criminal Procedure Code, cannot bind the lessor.

(2) Persons bound by order :—

The article applies to all persons bound by, or parties to, an order under Chapter XII of the Criminal Procedure Code, and to any other persons who may claim the property through any such persons under a title *derived subsequent* to the order. 23 C. 731 (F.B.) [*distinguishing* 6 C.L.R. 93, which held that the article can apply only as between the parties, whose possession has been confirmed by the Magistrate and such other party to that proceeding who claimed against them. It does not apply in favor of one of the parties who has subsequently succeeded by regular suit in ousting the parties put in possession by the Magistrate.]

(3) Right of assignee of a party defeated in Mamlatdar’s Court.

The assignee of a person defeated in a Mamlatdar’s Court cannot be in a better position than that of the latter. If the defeated party does not bring a suit under this article, an assignee of his rights will be barred. 18 B. 348.

3.—‘Or by any one claiming under such person.’—(concluded).

(4) **Purchase under mortgage-decree :—**

Where, subsequent to the mortgage of certain property, the mortgagor had failed in a suit against the defendants under the Mamlatdars' Act, a suit by the purchaser at court-sale in execution of the mortgage-decree to recover possession of the property from the defendants would not be governed by Art. 47, because the title acquired at the auction-purchase was not only that of the mortgagor but also that of the mortgagee. 6 Bom. L.R. 305.

4.—‘To recover the property comprised in such order.’

Suit for partition :—

A suit for partition of property comprised in a Mamlatdar's order is not a suit to recover such property, and does not fall within this article. 15 B. 299 ; 5 B. 27 ; 5 B. 25.

5.—‘The date of the final order.’

Order of the Sessions Court :—

In a case where there are proceedings for revision, before the Court of Sessions, and the latter Court confirmed the order of the Magistrate under Chapter XII, Criminal Procedure Code, limitation begins to run from the date of the order of the Magistrate, and not from that of the Sessions Court. 6 C. 709—8 C.L.R. 154.

General.

- (1) Possession for three years, under an order of a Magistrate in a proceeding under Act IV of 1840, would not create a title by prescription. 6 C.L.R. 249 (P.C.)=7 I. A. 78.
- (2) The Mamlatdar's finding on the point of actual possession is not conclusive. 5 B. 387.
- (3) The dismissal of a suit in the Mamlatdar's Court would not bar a suit by the plaintiff under S. 9 of the Specific Relief Act. 24 B. 251 (F.B.).
- (4) Nor would it bar a suit in ejectment, though brought more than three years after the Mamlatdar's order. 21 B. 91.
- (5) The order of a Magistrate under S. 145 of the Criminal Procedure Code, would not bar a possessory suit in the Mamlatdar's Court. 26 B. 353.

(6) **Burden of proof :—**

In a suit brought by the party defeated in the criminal proceedings under Chapter XII of the Criminal Procedure Code, the burden of proving his title to possession lies on the plaintiff. 4 C.W.N. 597 (P.C.) ; 6 C. W.N. 386 (P.C.).

(7) **Khoti Act (Bom. Act I of 1880) Ss. 20, 21, 22 :—**

Where, on the strength of a decision of the Survey Officer, under S. 20 of the Bom. Khoti Act, that the defendants were occupancy tenants, the Mamlatdar's Court gave them possession ; in a suit by the landlord to eject the defendants, the period of limitation will be computed, not

General—(concluded).

from the date of the decision of the Survey Officer, but from the date on which the *botkhat* was prepared and signed. 24 B. 426.

Where a person was dispossessed, by force of a Magistrate's order under the Criminal Procedure Code, a suit for possession of the property in dispute was not governed by s. 1, cl. 7, Act XIV of 1859. 9 W.R. 480.

(8) Act IV of 1840 :—

(a) Where a complaint under— ————had been dismissed by the Magistrate on the ground that there was no forcible dispossession, a suit to recover the property in dispute was not governed by Act XIV of 1859. 11 W.R. 477.

(b) Where a Zemindar let his estate in farm to a certain person for a number of years, delegating to such person the whole of his rights, privileges &c., an adverse order under Act IV of 1840 against such person bound the Zemindar also. 14 W.R. 395.

S. 1, Clause 7, Act XIV of 1859 :—

Where a Magistrate acted under a letter, from the Judge acting under Act IV of 1840, directing him to leave certain maliks, not in possession of a certain *dearah* in dispute, to their civil remedy, such order was not an order within the meaning of———. 30 W.R. 316.

48.—For specific moveable pro- *Three years.* When the person party⁽¹⁾ lost, or acquired by theft, or dishonest misappropriation⁽²⁾ or conversion,⁽³⁾ or for compensation for wrongfully taking or detaining the same.⁽⁴⁾ having the right to the possession of the property first learns in whose possession it is.

(Old Acts.)

[Art. 48 of Act IX of 1871.—For moveable property acquired by theft, extortion, cheating, or dishonest misappropriation or conversion—Three years—When the property is demanded and refused.

S. 1, cl. 2 of Act XIV 1859.—To suits for damages for injury to the person and personal property—the period of one year—from the time the cause of action arose.]

☞ The cases noted under this article and the next may be read together.

(Notes)

Scope of Article.

(1) Cutting and carrying away crops :—

(a) A suit for damages for cutting and carrying away crops is governed either by this article or by art. 49—*Per MACPHERSON, J.* 25 C. 692 (F.B.)= 2 C.W.N. 265.

Scope of article.—(concluded).

(b) A suit for damages for misappropriation by defendant of crops grown on plaintiff's land is governed by this article. *Per* NORRIS, J., in 22 C. 877.

(2) Suit for damages for injury to land :—

This article is not applicable to a suit for compensation for injury to land resulting in the loss of crops, which that land might have produced, but for the illegal act of the defendant, who had prevented the plaintiff from the use and enjoyment of the land. 4 W.R. 76.

(3) Suit to enforce equitable claims :—

(a) A——— in respect of moveables wrongfully converted by a deceased person, against whom a decree had been obtained, such proceeds being held by the defendant as agent of the representative of the deceased, is not governed by this article, but by art. 120; because such a suit is really one to enforce an equitable claim, on the part of the plaintiff, to follow the proceeds, for which there is no specific article in the Act. 10 C. 860 (P.C.) = 11 I.A. 59.

(b) A suit by the purchaser of a decree to recover money belonging to the deceased judgment-debtor, but which is in the hands of his agent, is governed by art. 120 and not by this article. 13 A. 368.

1.—‘Moveable property.’**Specific property, what is :—**

The term ‘specific moveable property’ means property of which you may demand the delivery *in specie*. The phrase is only apt when the thing to which you are entitled is in the hands of some third party. *Per* NORRIS, J. in 22 C. 877 (at p. 882); 11 B. 193.

A.—The following are moveable property.

1. Fruits upon trees. 3 A. 168.
2. Money. 11 A. 47 = 15 I.A. 211 (P.C.). Compare the words “moveable property” in art. 29 *supra* and 8 B. 17 noted thereunder at p. 738, *supra*.
3. Crops, when cut. 25 C. 692 (F.B.) = 2 C.W.N. 265; *Per* NORRIS J., in 22 C. 877.

B.—The following are not moveable property.

1. Huts. 10 W.R. 416.
2. Oil and flour mills, steam-engine and boiler are not goods and chattels, but fixtures. 4 C. 946.
3. Standing crops. 4 C. 665 = 2 C.L.R. 526; 6 B. 592.
4. Standing timber. 5 A. 564.

2.—‘Misappropriation.’**Suit for money misappropriated :—**

A suit for money, entrusted to defendant to be paid to a third person, but not so paid, is governed by this article, and the period begins to run from the time when the plaintiff first learns that the money was not paid as directed. 5 A. 341 = 3 A.W.N. 48.

3.—'Conversion.'

(1) Conversion, definition of :—

(a) Where a defendant, obtaining a decree for ejectment of plaintiff from a land, enters upon it and turns out plaintiff therefrom, in execution, and gives him no opportunity to remove his goods from the land, and the plaintiff, after ejectment, does not demand, and defendant does not refuse, the return of his goods, it cannot be said that there was conversion, by defendant, of plaintiff's goods. 22 M. 197 (201).

(b) Merely preventing plaintiff from removing his goods does not amount to conversion thereof. 8 M.L.J. 275. (Mitra's Limitation, 4th Edition, p. 846.)

(2) Suit by a widow against a co-widow :—

(a) A——— for a half-share of the amount realized by the latter under a succession certificate obtained by her would not be barred by this article, even if the same were brought more than three years from the death of the husband of the plaintiff and defendant. 16 P.R. 1897.

(b) See 10 C. 860 (P.C.)=11 I.A. 69 and 18 A. 368, under the heading "Scope of section," *supra*.

4.—'Wrongfully taking or detaining the same.'

Suit for ornaments deposited :—

A——— with defendant for safe custody, but wrongfully detained by him, is governed by art. 145, which is a specific article governing cases of this kind. 26 B. 480=4 Bom. L.R. 72.

49.—For other specific moveable *Three years*. When the property is property⁽¹⁾ or for compensation for wrongfully taking or injuring⁽²⁾ or wrongfully detaining the same. wrongfully taken or injured, or when the detainer's possession becomes unlawful⁽³⁾.

~~§~~ The cases noted under this article and those under art. 48 may be read together.

(Old Acts.)

[Art. 47 of Act IX of 1871.—For lost moveable property not dishonestly misappropriated or converted—Three years—When the property is demanded and refused.

S. 1, cl. 2 of Act XIV of 1859.—No exact corresponding provision. The provision very nearly approaching that in the present section is to be found in S. 1, cl. 2 :—To suits for damages for injury to the person and personal property—one year—from the time the cause of action arose.]

(Notes)

Scope of article.

(1) **Property in the hands of a third party :—**

This article is applicable only to suits in respect of property in the hands of a third party, and not to suits in respect of property in the possession of plaintiff himself. 11 B. 133.

(2) **Personal claim to moveable property :—**

The article is inapplicable when the plaintiff has not, strictly speaking, a *personal* claim to moveable property. 17 C. 3 (at p. 22) (P.C.)=16 I. A. 137, quoted in Mitra's Limitation (4th Edition) at p. 845.

(3) **Detinue :—**

This article is intended to apply to cases of———. 7 B. 427 (429).

(4) **Suit for declaration of right to estate :—**

A suit by a Mahomedan widow against the brother of her deceased husband, for a declaration of her right to possess for life the estate of the latter in accordance with a local custom, is governed by art. 120 and not by this article, nor by art. 123. 21 C. 157 (P.C.)=20 I.A. 155.

(5) **Wrongful deprivation of property :—**

A suit to recover damages caused by wrongful deprivation of property is governed by art. 120, and not by this article. 10 Bom. H.C.A.C. 346.

(6) **Personal property plundered :—**

A suit for damages to recover the value of personal property plundered and for other consequent damages was governed by the six years' rule, and not by S. 1, cl. 2, Act XIV of 1859 (=the present article). 2 W.R. 235.

(7) **Personal property misappropriated :—**

A suit to recover the value of———was governed by the six years' rule of limitation, and not by S. 1, cl. 2, Act XIV of 1859, corresponding to the present article. 5 W.R. 50.

(8) **Ornaments deposited :—**

Where certain ornaments were obtained by a person for borrowing money on them, a suit against him to recover them, or their value, was governed by the thirty years' rule under S. 1, cl. 15 of Act XIV, corresponding to art. 145 of the present Act, and cause of action therefor arose when an adverse claim in respect of the ornaments was set up by him. 14 W.R. 322.

(9) See, also, cases Nos. 1 (*a & b*) & 2 (*a & b*), at p. 765, *supra* and Nos. 3, 4, 5, 6 & 7, *supra*.**1.—'Moveable property.'**(1) **Damages for cutting and carrying away crops :—**

(a) A suit for——is governed by this article. The crop, though immoveable at first, becomes a specific moveable when cut. *Per* MACLEAN C. J., and TREVELYAN J., in 25 C. 692 (F.B.)=2 C.W.N. 265.

It will come under this art. or art. 48. It may also come under art. 109, if not under art. 39. *Per* MACPHERSON J., in *Ibid*.

Per GHOSE J., in *Ibid*—This art. applies.

I.—‘Moveable property.’—(concluded).

(b) A suit for damages for unlawfully cutting and carrying away crops would fall under this article since the crops become moveable property the moment they are cut and the carrying away would, in consequence, be only of moveable property. *Per GHORR, J.* in 22 C. 877; 6 B.H.C.A.C. 144. **But** see next case.

(c) A suit to recover damages for cutting and carrying away crops is a suit to recover the value of the crops and as such it is governed by art. 120 and not by this article. 17 W.R. 277.

(NOTE).—This case is practically overruled by 25 C. 692 (F.B.)=2 C.W.N. 265.

(2) Property attached before judgment :—

(a) A suit for compensation for wrongfully procuring an attachment of moveable property, before judgment, falls within this article, the cause of action accruing from the date of the attachment. 19 M. 80=6 M.L.J. 12.

Compare next case.

(b) It is doubtful whether this article applies to a suit to recover damages and compensation in respect of a wrongful attachment of certain rubies, before judgment. *Per BARRY, J.* in 6 Bom. L.R. 704.

(3) Legacy :—

A suit to recover specific moveable property from one, who is in unlawful possession thereof, would be governed by this article, notwithstanding the fact that the property was the subject of a legacy; and art. 123 would not apply. 9 C. 79.

(4) Suit for specific moveable or for compensation :—

A suit for the recovery of specific moveables or their value, as compensation, is governed by this article, the alternative prayer being auxiliary to the main relief. 22 M. 473.

(5) Distrainted property—Madras Act VIII of 1865 :—

• A suit to recover specific moveable property wrongfully distrained under the Rent Recovery Act, is not governed by section 78, Rent Recovery Act, but by this article. 20 M. 449=7 M.L.J. 225.

(6) Title deeds with mortgagee :—

• A suit to recover title-deeds retained by the mortgagee, after redemption, is governed by this article and not by art. 116, and the time begins to run from the date of the mortgagee's refusal to deliver the same. 15 M. 157=2 M.L.J. 54.

(7) Moveables deposited :—

A suit for the recovery of moveable property deposited is governed by this article, not by art. 145, and such a suit will be barred if not brought within 3 years from the date of demand and refusal. 9 M.L.J. 51,

2.—‘*Injuring.*’

The word “injury” means a loss or deterioration caused by a wrongful act, and the phrase “injury to personal property” means some damage directly caused by some wrongful act to some particular piece of property. 3 M.H.C. 165.

3.—‘*When the detainer’s possession becomes unlawful.*’(1) **When detention becomes unlawful? :—**

The suit, by a successful plaintiff in a suit for specific performance of a contract of sale in respect of moveable and immoveable property, for recovery of the moveable property covered by the contract, will be in time if brought within three years from the date of the decree for specific performance, since it is from such date that the detention of the moveable property becomes unlawful. 5 B. 554.

(2) **Government Securities wrongfully detained :—**

Where certain Government securities were made over to defendant^x for raising funds, with a stipulation that they should be redeemed or replaced, when so required by the assignor, but were not replaced by defendant when called upon to do so, a suit to recover them or their value may be governed by this article, as it may perhaps be regarded as a suit for compensation for the wrongful detention of specific moveables; art. 145, would not apply as the transaction did not amount to a deposit. *Per HILL, J.* in 8 C.W.N. 500—31 C. 519.

(3) As to when the period begins to run, see cases Nos. 2, 6 and 7, under the heading ‘*Moveable property*’ *supra*; and case No. 8 under the heading *Scope of article*, at p. 766, *supra*.

50.—For the hire of animals, *Three years*. When the * hire becomes payable.
vehicles, boats or household furniture.

(Old Acts.)

[Art. 49 of Act IX of 1871.—Same as above.

S. 1, cl. 8 of Act XIV of 1859.—To suits to recover the hire of animals; vehicles boats or household furniture—the period of three years from the time the cause of action arose.]

51.—For the balance of money⁽¹⁾ *Three years*. When the goods ought advanced⁽²⁾ in payment of to be delivered.
goods to be delivered.

(Old Acts.)

[Art. 50 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision; the provision very nearly approaching the article being that contained in cl. 9, of S. 1.]

(Notes)

1.—'Money.'

(1) Definition :—

'Money' means and includes not only coin, but also bank-notes, Government promissory notes, bank deposits, and otherwise and generally, any paper obligation or security that is immediately and certainly convertible into cash so that nothing can interfere with and prevent such conversion. 3 A. 788 (at p. 793).

(2) Government securities :—

Government securities are not money. 7 C.W.N. 476 (491). See, also, *Mitra's Limitation* p. 847.

(3) Kankar :—

Suit for breach of contract to deliver———. See 22 P.R. 1883 noted under art. 64, *infra*.

2.—'Advanced.'

(1) Suit for balance of indigo-account :—

The article is applicable to a suit for balance on an indigo-account and advances subsequently made for the supply of goods, the cause of action, as regards the balance, accruing at the time of adjustment and, as regards the advances, at the time when the goods ought to have been delivered. 9 W.R. 209.

(2) Suit for balance of account of moneys advanced :—

This article is applicable to a——— in payment of goods to be subsequently supplied, the cause of action accruing at the time when the goods ought to have been delivered, if a time had been fixed by contract; and, if no time had been fixed, and there was no usage, after a reasonable time after the advance of money. 7 W.R. 164.

(NOTE).—The above two cases were held governed by S. 1, cl. 9 of Act XIV of 1859.

52.—For the price of goods sold *Three years*. The date of the delivery and delivered,⁽¹⁾ where no very of the goods.⁽³⁾ fixed period of credit is agreed upon.⁽²⁾

(Old Acts.)

[Art. 51 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

Articles 52, 53, 57, 59, 61, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79 and 80, have been amended by the Punjab Act I of 1904, so far as the Province of the Punjab is concerned. The Act has been printed in full as *Appendix I*, at the end of this Act.

(Notes)

Scope of article.

(1) **Intention of parties to contract :—**

Where the intention of the parties was that the price of goods supplied was not claimable as of right on the date of its being supplied, but rather when the contract was completed or came to an end on the *whole* of the goods being supplied, art. 53 and not this article would apply. 7 A. 284 = 5 A.W.N. 40.

(2) **Purchase by father—Suit against son :—**

Where, for price of goods sold and delivered to a Hindu father, a suit is brought against the father or the son on the original cause of action itself, this article would apply; but if, after a decree obtained against a deceased undivided Hindu father, a suit is brought against the son, for enforcing the decree as against family property in his hands art. 120 would apply. 27 M. 243 = 14 M.L.J. 84.

(3) **Price to be fixed after delivery and acceptance :—**

In the case of a contract for supply of articles, from time to time, the price to be fixed and payment to be made after delivery and acceptance of each set of articles, the cause of action arises as each set of articles are delivered and accepted. To such a case this article would not apply. 2 M.H.C. 6.

*1.—‘Goods sold and delivered.’***Articles sold in retail :—**

A suit to recover the value of articles sold by retail and supplied for household purposes would be governed by this article and not by art. 120. 7 W.R. 101.

(NOTE).—This was a case under Act XIV of 1859.

*2.—‘Where no fixed period of credit is agreed upon.’***Articles supplied from time to time :—**

Where goods were supplied from time to time, no fixed period of credit being agreed upon, the period of limitation would run from the date when each item claimed was supplied; but if a period of credit had been fixed, limitation would run from the expiration of such period. 11 W.R. 529.

(2) **Sale of goods wholesale :—**

Where there is no written contract, a suit for the price of goods sold wholesale would be governed by this article. A sale of seeds, which is not required by purchaser for his private use, but for making oil for sale, is ‘a sale of goods wholesale.’ 9 W.R. 193 = B.L.R. Sup: 909.

3.—'The date of the delivery of goods.'

See 11 W.R. 529 under heading No. 2, *supra* at p. 770.

(NOTE).—S. 1, cl. 8 of Act XIV of 1859 had made a provision for articles sold by retail. The present Act has made no such provision. Hence the following cases, which bore on S. 1, cl. 8 of Act XIV of 1859, do not find a place in the notes to this section :—1 W.R. 308 ; 3 W.R. S.C.C. Ref. 24 ; 8 W.R. 4.

- 53.**—For the price of goods sold *Three years*. When the period of and delivered to be paid credit expires.
for after the expiry of a
fixed period of credit.

(Old Acts.)

[Art. 52 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

See 11 W.R. 529 and 7 A. 284 = 5 A.W.N. 40, noted under art. 52 *supra*.

- 54.**—For the price of goods sold *Three years*. When the period of the and delivered to be paid proposed bill elapses.
for by a bill of exchange,
no such bill being given.

(Old Acts.)

[Art. 53 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

- 55.**—For the price of trees or *Three years*. The date of the sale. growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.

(Old Acts)

[Art. 54 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

Suit for possession of tree standing on land :—

Suit for possession of a tree purchased would be governed by art. 144 and not by this article whatever may be the intention of the plaintiff as to cutting and converting it into moveable property. 19 B. 207 ; 112 P.R. 1884.

56.—For the price of work done⁽¹⁾ *Three years*. When the work is by the plaintiff for the defendant at his request, where no time has been fixed for payment.

(Old Acts)

[Art. 55 of Act IX of 1871.—Same as above.

Act XIV of 1859.—*No corresponding provision.*]

(Notes)

1.—‘For the price of work done.’

(1) **Work done by plaintiff for defendant :—**

A suit for price of work done for defendant, brought more than three years after the time the work was done, would be barred, if there be no acknowledgment to save it from limitation. 30 C. 687.

(2) **Suit for price of repairs done at defendant's request :—**

A suit for the recovery of money expended at the request of defendants for the repair of a certain tank is governed by this article ; to such a suit time will run from the date of the execution of the work. 9 M. 334.

(3) **Work done on joint contract :—**

Unless otherwise agreed upon, the cause of action for a suit for price of work done on a joint contract would accrue from the time when the labor was performed, and not before. W.R. 1864, 68.

57.—For money⁽¹⁾ payable for *Three years*. When the loan is made. money lent.⁽²⁾

(Old Acts.)

[Art. 56 of Act IX, of 1871.—Same as above.

S. 1, cl. 9 of Act XIV of 1859.—There is no provision exactly corresponding to this article. The provision very nearly approaching it is that of S. 1, cl. 9 :—‘To suits brought to recover money lent, or interest, or for the breach of any contract—the period of three years from the time when the debt became due, &c.’]

(Notes)

Scope of article.

(1) **One-sided account :—**

A banker lending money, at intervals, to a cloth-merchant and striking balance always in his favour, is governed by this article and not by art. 85. 18 A.W.N. 34 and 16 A.W.N. 186.

Compare 12 A.W.N. 215—15 A. 1 and 3 A. 538.

Scope of article.—(concluded).**(2) Account stated :—**

(a) A suit to recover the balance due to the plaintiff on accounts stated and signed by the defendant in the plaintiff's account-book, is governed by art. 64, and not by this article. 3 A.W.N. 47.

Compare 12 A.W.N. 215 = 15 A. 1.

(b) A suit on an——but not signed by the defendant or his duly authorised agent is not governed by art. 64. 1 A.W.N. 29.

1.—' Money.'**Government securities :—**

——are not ' money '—See 7 C.W.N. 476 (481).

2.—' Money lent.'**(1) Money lent on verbal agreement fixing date :—**

A suit to recover money lent on a verbal agreement, payable at a specified date, is governed by art. 115 and not by this article or art. 59; 15 M. 380 = 2 M.L.J. 42; 10 C. 1033.

Per HARTH, C. J.—Arts. 57 and 59 are applicable to loans payable on demand. 10 C. 1033.

(2) Suit by pawnee against pawnor :—

A———for balance of debt due under a pawn, after crediting proceeds of sale of the articles pawned, is governed by this article—the decree prayed for being only a personal one against the debtor. 24 A. 251.

(3) Suit for sale of pledged property—personal remedy :—

Where the plaint prays for sale of the property pledged and also for a personal remedy against the defendant, the suit will, so far as the former remedy is concerned, be governed by art. 120; and by this article, as regards the latter remedy. 116 P.R. 1881; 22 C. 21; 17 A. 284 = 15 A.W.N. 46; 27 M. 528 (F.B.) = 13 M.L.J. 445.

Per SUBRAMANIA AYYER and BENSON, JJ. :—Where both the rights—viz. the right to proceed against the pledged property, and that against the person of the debtor exist, they are concurrent rights, the former right being not merely accessory to the latter. 27 M. 528 (F.B.).

Per DAVIES, J. *contra*—The right to proceed against the property is only accessory to that to proceed against the debtor personally; and if the latter's right is barred, no suit will lie at all to proceed against the property : because his right to sell the property without reference to the Court still exists and a suit to sell the property is unnecessary.

Compare, on this point, 11 M. 153, which is now overruled by the (F.B.) decision in 27 M. 528, *supra*.

But see 9 W.R. 171 (173), where SIR BARNES PEACOCK says :—"If land is mortgaged as security for a loan, in addition to a covenant for payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to us

2.—'Money lent.'—(concluded).

that the charge upon the land created an interest upon the land, and that a suit brought to enforce that charge is, in substance and in effect a suit for the recovery of that interest. These observations with regard to pledges of immovable property apply also to pledges of moveables". (Vide 22 C. 21 at pp. 24 and 25).

General.

(1) Claim by liquidators to prove a debt:—

A ———— against an insolvent's estate is treated as a *suit* by the creditor, and may be governed by this article. 12 C.L.R. 185. (Vide Mitra's Limitation, 4th Edition, page 850.)

(2) Bank receipt:—

Where a Bank gave a receipt to a depositor, to the effect that the money would be repayable on production of the same (receipt), *held*, the receipt constituted not only an acknowledgment, on the part of the Bank, of the receipt of the money but it also contained the terms of the contract regarding repayment, and that the production of the receipt was a condition precedent to the repayment of money. 14 B. 498.

(NOTE).—In such a case it is apprehended that time would begin to run from the production of the receipt.

(Old Law.)

2 M.H.C. 387, 5 B.H.C.O.C. 16 and 10 B.H.C.A.C. 300, were cases bearing on S. 1, cl. 9 of Act XIV of 1859: The substance of these cases is not given here because that clause is not law *now*.

58.—Like suit when the lender *Three years*. When the cheque is has given a cheque for the paid.
money.

(Old Acts.)

[Art. 57 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

59.—For money⁽¹⁾ lent⁽²⁾ under an *Three years*. When the loan is agreement that it shall be made.⁽⁴⁾
payable on demand.⁽³⁾

(Old Acts.)


[Art. 58 of Act IX of 1871. First and second columns same as above—Third column:—When the demand is made.

Act XIV of 1859.—No provision corresponding to the present article. The provision very nearly approaching the present article is that in S. 1, cl. 9:—To suits brought to recover money lent—the period of three years from the time when the debt became due.]

60.—For money deposited^(s) under *Three years*. When the demand is made.
an agreement that it shall be payable on demand.

(Old Acts)

(NOTE).—There was no corresponding provision in either of the earlier Acts IX of 1871 and XIV of 1859.

 The above two articles, 59 and 60, and the notes hereunder, have to be read together. So, the indices in the two articles are numbered consecutively.

(Notes)

Scope of article 59.

Difference between this article and article 59 of the Old Act pointed out. 19 B. 352 and 6 M. 290.

Scope of article 60.

The article would not apply where there is no agreement between the parties, (e.g.) a suit against Government to recover surplus sale-proceeds of a sale for arrears of Government-revenue. 18 O. 234 (241).

(NOTE).—TOTTENHAM and TREVELYAN, JJ., decided that cases of this kind are governed by art. 62 (*vide* page 241). But this case has been since overruled by 20 C. 51 (F.B.), which decided that art. 120 applied to such cases, holding that there is no specific article applying to it and that neither arts. 59 and 60 nor 145 applied to them.

1.—‘Money.’

Government Securities :—

— are not money. A suit for return of — handed over by plaintiff to be held by the latter on account of the former, subject to the right of dealing with them by sale or pledge, should necessarily arise, is governed by art. 145 and not by article 59. 7 C.W.N. 476 (481).

2.—‘Money lent.’

(1) Distinction between loan and deposit :—

(a) Where money is lodged with another under an express trust or under circumstances from which a trust can be inferred, the transaction is called a ‘deposit’; where money is lodged with another under an express arrangement that it should be paid back on demand with interest, it is only a ‘loan.’ 19 B. 775 : Compare 6 U.L.R. 470, where it is decided that a ‘deposit’ necessarily means money lodged under a trust and 15 C. 25, which dissents from the last case and decides that a deposit does not necessarily imply a trust.

(b) Though moneys paid to a Banker are called ‘deposits,’ if, in reality and in point of law, they are moneys lent, the transaction would, for purposes of limitation, be governed by article 59. 95 P.R. 1885.

2.—'Money lent.'—(concluded).

(c) Whether a particular transaction is a loan or a deposit, is a question of fact to be decided on the facts of each case on evidence. 15 C.P. L.R. 147.

(2) Money allowed to remain with another :—

Where money was allowed to remain in deposit with a person on condition that it should carry interest at a certain rate, a suit for the recovery of the same would be governed by art. 59. 15 C.P.L.R. 147.

(3) Banker and Customer :—

A suit by a customer to recover money *deposited* with a shopkeeper and banker, the deposit being payable with interest on demand, is governed by art. 60 and not by art. 59, the cause of action arising from the date of demand. 18 M. 390—5 M.J.J. 203.

(4) Native Banker and Customer :—

The relationship between a native banker and the person depositing money with him in the ordinary way of business is that of borrower and lender; and art. 59 governs a suit to recover money lodged with a banker. In such cases time would begin to run from the date of the loan. 18 B. 338; 95 P.R. 1885.

(5) Money deposited with a trustee :—

Where the defendant occupies the position of a trustee and amounts are paid to him from time to time on account of a minor, and credited in the defendant's account in the name of the minor, a suit by the latter for the recovery of the accumulated amount would fall under art. 60 and not under article 59. 19 B. 352: on appeal, 19 B. 775.

(6) Loan of money for investment in trade :—

A———according to the defendant's choice and repayable with the profits of the trade is governed by art. 60, and time would begin to run from the date of demand. 14 W.R. 87.

(7) Suit for interest :—

A———alone on money lent is neither one for money *lent* under an agreement that it should be payable on demand, falling under article 59, nor one for money *deposited* under an agreement that it should be payable on demand, but one falling under art. 63. 3 A. 328.

(8) Suit on a registered bond :—

A———payable on demand, is treated as a suit for compensation for breach of contract, and is governed by arts. 59 and 116 for purposes of limitation. 86 P.R. 1881.

(9) Claim of secured creditors against insolvent's estate :—

The——— is governed by art. 59, as it is in the nature of a suit for a money-decree. 12 C.L.R. 165.

(10) Claim of liquidators :—

The claim of the liquidators of an insolvent to prove is not governed by art. 60 but by art 59. 12 C.L.R. 165.

3.—‘Payable on demand.’

(NOTE).—Before Act IX of 1871, time began to run, in the case of a loan under an agreement that it should be repayable on demand, from the date of the loan and *not* from the date of the demand. Act IX of 1871 (art. 58) introduced a change and made the period run from the date of the demand. This again was abrogated by the present article under which time begins to run from the date of the loan.—See the remarks of HOLLOWAY J. in 7 M.H.C. 293 and *cf.* 4 C. 283, *infra*.

(1) Meaning of the term ‘on demand’ :—

Where a man promises to pay a sum of money on demand, the money is payable at once and no demand is necessary before suing therefor, but if the promise is made in consideration of some collateral thing being done on demand, there must be a demand made before the promise can be enforced. 4 C. 283 at p. 294. See 7 M.H.C. 293 *supra*.

Compare 20 M. 245, which holds that the words “payable on demand” in a document mean payable *immediately or forthwith*. 20 M. 245.

(2) ‘On demand’ or ‘when you require,’ meaning of :—

When a bond is payable ‘on demand’ or ‘when you require’ and the words are used as implying a condition for repayment, the money is not repayable, and the cause of action does not arise, until a demand is actually made. 8 M.L.J. 167 : *Compare* 7 B.L.R. 489=16 W.R. 164 and 5 B.L.R. 396=16 W.R. 164 (Note).

(3) Pro-Note, exclusion of date of :—

In the case of a promissory note payable on demand, the day on which the note was executed should be excluded in computing the period of limitation. 8 B.L.R. 24=16 W.R. O.C. 1. *Compare* 6 B.L.R. 392.

(4) Cause of action dependent on demand :—

Where, according to a contract, the cause of action does not arise until a demand is made, limitation begins to run only from the date of demand. 3 M. 87.

(5) Pro-Note payable any time within six years on demand :—

A ———— does not fall under article 59. It falls under art. 120, there being no other article specifically providing a limitation for such a case. 6 M. 290.

(6) Bank receipt :—

When a ———— states as a condition that the amount mentioned therein shall be repayable on production of the same at the Bank, the cause of action for repayment does not arise and time does not begin to run until the receipt is actually produced to the Bank for repayment. 14 B. 498.

General.**Non-agriculturist debtor—Agriculturist surety :—**

Though a suit be barred under this article as against a non-agriculturist principal debtor, it may not be barred as against an agriculturist surety, since, in the case of the latter, the period is extended by S. 72 of the Deccan Agriculturists’ Relief Act. 5 B. 647.

4.—‘When the loan is made.’

Commencement of time:—

In a suit to recover money lent upon an agreement that the money is re-payable on demand, limitation runs from the date of the loan. 2 M.H.C.R. 472.

Pro-Note payable on demand:—

The cause of action for a Pro-Note payable on demand arises immediately the loan is made, but the day on which the note is executed ought to be excluded from consideration. 6 B.L.R. 292.

Old Law.**When the cause of action arose:—**

Before the present article was enacted, the cause of action for money lent under an agreement that interest should be paid at a certain rate and the principal should be paid on demand, the cause of action, so long as the interest continued to be paid, did not arise for the principal unless and until the demand was actually made. This rule applied to Mofussil Courts, the Courts in Presidency Towns following the English rule under which the cause of action, under similar circumstances, arose immediately the loan was made. The present Act, however, enacted the English rule for all Courts alike, the cause of action now arising, under this article, the moment the loan is made. Compare 14 W.R. 224 = 6 B.L.R. 160; 14 W.R. 87. Compare 10 B.H.C. A.C. 300.

5.—‘Deposited.’

(1) Deposit, definition of:—

The word———does not necessarily mean the lodging of money with another on a ‘trust.’ 16 C. 25 (31).

(2) Money deposited in Bank:—

(a) Where money is deposited with defendant, who carries on a banking business, from time to time, the amounts deposited bearing interest at a certain rate, a suit to recover such amounts will be governed by art. 60 and not by art. 59, and time will begin to run from the date of demand. 16 C. 25.

The dictum of WHITE J., in 6 C.L.R. 470, to the effect that the word ‘deposit’ as distinguished from a ‘loan’ points to cases in which money is deposited with another under an express trust, *dissented from*.

(NOTE).—This case (16 C. 25) points out the difference between ‘a deposit’ and ‘a loan.’

(b). Where money representing presents and the like made to the plaintiff during his minority was deposited by his mother with her father and credited in the accounts in the name of the plaintiff, the latter's suit to recover such moneys held to fail under article 60. 19 B. 382; on appeal. 19 B. 775.

(NOTE).—In this case, the distinction between a ‘deposit’ and a ‘loan’ has been pointed out.

5. — 'Deposited.' — (concluded).

(c) Where a bank-deposit carrying compound interest, is withdrawable at the depositor's will, the debt becomes due at the end of each year without demand and the depositor's claim is limited to three years from the date of deposit. 24 W.R. 42.

(d) A suit to recover money deposited with a shop-keeper, carrying on the business of a banker, and payable with interest on demand, is governed by article 60 and not by article 59, the cause of action accruing from the date of demand and not from the date of deposit. 18 M. 390 = 5 M.L.J. 208.

(3) Mortgagor's money allowed to remain with mortgagees :—

Where a mortgagor allows the amount of his loan to remain in the hands of the mortgagee, taking a receipt therefor, a suit to recover the balance of such money is in the nature of a suit to recover the amount of a deposit. 2 N.W.P.H.C. 409.

(4) Floating account— Suit for balance :—

Where, in the case of a floating account, the suit is brought for the balance due, it will be in time if brought within three years from the time the interest was paid on account stated for the last time. 1 A.W.N. 48 = 3 A. 738.

(5) Suit for cash deposited :—

A ———— in 1855 would, if brought after this Act came into force, be barred by limitation, if the claim had been barred by limitation while Act XIV of 1859 was in force, whether it is regarded as a suit falling under cl. 9 of S. 1 or under cl. 10 of S. 1. of the latter Act. 74 P.R. 1882.

(6) Share of profits deposited :—

Where, in a Mahomedan family consisting of two brothers and an uncle, accounts of profits of certain landed properties having been settled, and the amounts due to each being separately appropriated, the share of one of the brothers was deposited with the uncle, a suit for recovery of the amount so deposited was held not governed either by article 60 or by art. 127. 10 A. 109 = 8 A.W.N. 8.

(7) Deposit of palla or dowry money :—

A deposit of *palla* or dowry money with a *banker* in the names of the intended bride and bridegroom is governed by article 60 and time begins to run only from the date of demand. 5 Bom. L.R. 511.

(8) Deposit in respect of an office :—

A suit for the recovery of a deposit of security for the due discharge of the duties of an office is governed by art. 120, and not by article 60. 12 C. 113.

(9) Deposit in Government treasury :—

The limitation for a suit for recovery of a ———— does not exceed six years. 2 N.W.P.H.C. 379.

~~As~~ As to when time begins to run, see cases Nos. 3, 4, 6, under heading (3), Nos. 1, 2, 4, 6, under heading (3); the two cases under heading (4), and Nos. 2 (a), (c), (d), 4, & 6 under heading (5) *supra*.

- 61.**—For money payable to the *Three years*. When the money is plaintiff for money paid paid.⁽²⁾
for the defendant.⁽¹⁾

(Old Acts.)

[Art. 59 of Act IX of 1871.—Same as above.

Act XIV of 1859.—*No corresponding provision.*]

(Notes)

Scope of Article.

(1) Suit against Secretary of State:—

It is doubtful whether this article would apply to a suit for the recovery of money paid on behalf of the Secretary of State for India in Council. 14 C. 256.

(2) Payment made by plaintiff for defendant:—

A suit to recover a balance with reference to payments made by plaintiff on account of defendant, would be governed by this article. 24 W.R. 390.

(3) Second suit for contribution:—

Where the amount decreed against one of the defendants in a contribution-suit could not be realized, a suit against the other defendants to contribute towards the deficiency is not governed by this article, but by art. 99. 1 P.L.R. 149.

1.—‘ For money paid for the defendant.’

(1) No necessity for request by defendant:—

There need be no request on the part of the defendant that the money should be paid by the plaintiff for him. A request will be implied if the plaintiff, being compellable by law to pay, has paid the money, and the defendant has enjoyed the benefit of the payment. 5 Bom. L.R. 725 (727).

(2) Suit for contribution by one of two co-owners:—

Where money is paid by one of two joint-owners of a tenure to save the estate from sale for arrears of revenue and rent, a suit by him for contribution against the other is governed by this article. 25 C. 844 (P.C.) = 25 I. A. 95.

(3) Suit for contribution by co-sharer:—

A suit by one of two co-sharers, jointly liable to pay the rent of the holding, for contribution against the other, the whole of the rent having been paid by the plaintiff, will be governed by this article. 6 C.W.N. ccxv.

(4) Suit by one joint manager against another:—

A suit to recover money spent in excess of his share by one of two managers of certain temples against another, both being bound under an award to manage certain temples and defray expenses thereof jointly is governed by this article, though it may become necessary, incidentally to take accounts. 19 A. 244 = 17 A.W.N. 43 (16 A. 383) (P.B.).

1.—‘For money paid for the defendant.’—(concluded).

(5) Suit against reversionary heir :—

A suit against a reversionary heir to recover money paid to redeem a mortgage of his predecessor in title is governed by this article. 6 O.O. 212.

(6) Principal and Surety :—

Where, in consequence of the failure of the principal debtor to pay, the surety paid the amount due, a suit to recover the amount so paid is governed by this article. 31 P.R. 1904.

2.—‘When the money is paid.’

(1) Involuntary payment :—

In cases where there is no voluntary payment by the plaintiff but his property is attached and sold and the sale-proceeds are paid over to the holder of the decree against the plaintiff and the defendant, time will begin to run, not from the date of the realization from plaintiff, but from the date on which the amount realized was paid to the decree-holder. 4 C. 529.

(2) Suit for contribution—Involuntary payment :—

It is doubtful whether, in a suit for contribution by one judgment-debtor against another, the article would apply, where no money was voluntarily paid by the plaintiff but his property was attached and sold and the sale-proceeds paid over to a decree-holder. If it does apply to such a case, time would begin to run from the date of payment to the decree-holder and not from the date of realization by the Court from the plaintiff. 20 M. 23 (*following* 4 C. 529).

But see 26 M. 686 (696) (F.B.)—13 M.L.J. 83, where BHASHYAM AYYENGAR, J. has held that the article is applicable whether the amount was voluntarily paid by the plaintiff, or the same was realized by sequestration and sale of his property, or he paid the money to avoid a coercive process.

(3) Suit for contribution by manager of a Joint Hindu family :—

(a) A suit for contribution against the co-parceners by the Manager of a Hindu family, who paid the whole of the family-debt, is governed by this article, the cause of action arising when the money is actually repaid by him. 8 M.L.J. 271.

(b) Where a managing member of a Joint Hindu family borrows money and spends for family purposes and then brings a suit against the other members of the family for contribution, having repaid the loan out of his private funds, his cause of action would arise on the date on which he originally expended the borrowed money on behalf of the family, and not on that on which he repaid the loan. 5 C. 821; 12 W.R. 194 = 6 B.L.R. 103; 20 C. 18.

(4) Commencement of time :—

(a) In a suit for contribution, limitation runs from the date when payment was made in excess of plaintiff's share, whether this article or art. 81 applies. 11 A.W.N. 102.

(b) The cause of action for a suit under this article does not arise until the plaintiff is actually out of pocket so much so that even the passing of a decree against the plaintiffs at the instance of a third person does not give him a cause of action. 13 C. 155.

- 62.**—For money payable by the *Three years.* When the money is received by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.⁽¹⁾

(Old Acts.)

[Art. 60 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

- (1) **Suit for haq-i-chaharum :—**

A———by a Zemindar is not governed by this article, whether the claim is based on custom or otherwise. 18 A. 430 = 16 A.W.N. 140; [following 1 A. 444 (F.B.) and 2 A. 358].

But see 13 A.W.N. 65, which holds such suit to fall under this article.

- (2) **Receipt must be on account of plaintiff himself :—**

To make the article applicable, the amount ought to have been received by the defendant for the plaintiff. Even if the receipt had been for somebody else, whose shoes the plaintiff has stepped into, the article would not apply. To such a case article 120 will apply. 13 A. 368 [following 10 C. 860 (P.C.)]

1.—‘Money received by the defendant for plaintiff's use.’

A.—Suits falling under this article.

- (1) **Suit by a member of a Joint Hindu Family :—**

A———against another, after separation, for realization of the former's share in moneys collected under a bond executed in the latter's name alone, is governed by this article, and not by art. 120. 6 A. 442 = 4 A.W.N. 154.

- (2) **Suit by one heir against another :—**

A suit by plaintiff, against his co-heir, for recovery of the former's share of money received by the latter from a third person, with whom it had been deposited by the person from whom both the heirs claimed, is governed by this article and not by art. 120. 3 A. 170.

- (3) **Suit against benamidar :—**

A suit by a beneficiary against a *benamidar* for money realized by the latter on a decree based on a bond standing in his name for the beneficiary, is governed by this article. 25 A. 62.

- (4) **Suit against recipient's son or heir :—**

This article is applicable to cases where money was received by the *defendant* himself. If the defendant had not received the money but his father had, the cause of action could not arise until the father's death, because it is then that the son receives the money. 25 A. 55.

1.—‘Money received by the defendant for plaintiff's use.’—(contd.)

A.—Suits falling under this article.—(continued.)

(5) Suit by decree-holder against auction-purchaser :—

A suit by the holder of a money-decree, which had been sold in execution of a decree against him, against the auction-purchaser (on the sale being set aside), for recovery of the money realized by the latter under the decree, is governed by this article. 2 A. 354.

(6) Suit for recovery of money on failure of consideration :—

Where a sale, by a member of a joint Hindu family, went off on objection being taken by the other co-sharers, when the purchaser attempted to take possession of the property, a suit by the latter for recovery of money paid by him *held* governed by art. 97 and not by this article. If it did not fall under art. 97, it would fall under this article. Time begins to run when the consideration fails. 19 C. 123 (P.C.)=18 I.A. 158.

(NOTE).—The High Court had held in the same case that this article was applicable to the suit. 15 C. 51.

(7) Suit by vendee against vendor for compensation :—

Suit for compensation by vendee against vendor, for failure to give possession of part of the lands sold in consequence of the latter's not having title thereto, is governed by this article and not by art. 97; and the cause of action, in such cases, arises on the date of the sale. 25 B. 593=8 Bom.L.R. 190.

(8) Suit by assignee of mortgage against assignor :—

If, in a redemption-suit against the original mortgagor and assignee from him, the latter's title is not recognized owing to non-registration of the deed of assignment and the mortgage-money is paid to the original mortgagor, a suit by the assignee against the original mortgagor for the recovery of the amount paid for the assignment will be governed by this article, being one for money received by the defendant for the plaintiff's use; if, in the same case, the assignment of the mortgage had been followed by possession and such possession is lost owing to non-registration of the deed of assignment, the suit will be regarded as one for money paid upon an existing consideration which afterwards failed (art. 97). In the former case, the receipt of the mortgage amount by the mortgagor and in the latter, the loss of possession, will be the starting point. 25 M. 396.

(9) Sale void *ab initio* :—

A suit to recover money paid on a sale which is void *ab initio*, is governed by this article, the cause of action running from the date of the sale. 18 M. 173=5 M.L.J. 32.

(10) Mesne profits—Suit by real owner against benamidar :—

A suit by the real owner against a *benami* purchaser, (the latter denying the title of the former) for mesne profits, is governed by this article. 7 A.W.N. 91.

I.—'Money received by the defendant for plaintiff's use.'—(contd.)

A.—Suits falling under this article.—(continued.)

(11) **Suit for compensation-money :—**

A suit by a mortgagor against the mortgagee to recover the compensation-money paid by Government for the mortgaged land and wrongfully received by the mortgagee, is governed by this article, the cause of action arising from the date the money was paid to the defendant mortgagee. 1 A.W.N. 54.

(12) **Suit for Government allowance :—**

Suit for arrears of plaintiff's share in a certain government allowance received by the defendant is governed by this article. 22 B. 669 : Cf. 15 B. 135.

(13) **Emoluments of shetsandi vatan :—**

Suit to recover the excess in the contribution paid by the holders of a part of a *shetsandi vatan*, towards the annual emolument of the office-holder, is governed by this article. 10 B. 665.

(14) **Deahpande vatan—One co-sharer against another :—**

A suit by one co-sharer against another for recovery of arrears, the whole having been received by the latter, (defendant), is governed by this article. 9 B. 111.

(15) **Desais—Amin Sukhdi allowance :—**

A suit for his share of *amin sukhdi* allowance by one *desai* against another, who has received the whole allowance, is governed by this article and not by art. 132. 8 B. 426.

(16) **Landlord and tenant—Money-value of grain :—**

A suit by a landlord against his tenant for arrears of money-value of fixed quantities of grain payable annually by the latter to the former is governed by this article and not by art. 132. 8 B. 284.

(17) **Haks—Yatan :—**

A suit by one sharer in a *vatan* against another sharer or alleged sharer who has improperly received the plaintiff's share of the *huk*, is governed by this article and not by art. 132. 7 B. 191.

(18) **Suit for recovery of surplus sale-proceeds :—**

A suit for recovery of surplus-proceeds of a sale held under Regulation VIII of 1819 (Bengal) wrongfully taken out by defendant in execution of a decree against a third party, falls under this article. 30 C. 440=7 C. W.N. 520 (*dissenting from* 8 B. 17).

(19) **Undivided Hindu family :—**

A suit for share in outstandings, left undivided at a partition of a joint Hindu family, afterwards realized by one member of the family, is governed by this article and not by art. 127. 24 C. 809.

(20) **Suit for surplus sale-proceeds in Collector's hands :—**

A suit for recovery of money in the hands of the Collector, being the sale-proceeds of certain property sold for arrears of Government-revenue, would be governed by this article and not by art. 145. 18 C. 284.

I.—‘Money received by the defendant for plaintiff's use.’—(contd.)

A.—Suits falling under this article.—(continued).

(21) Short delivery of goods :—

A suit for recovery of balance due on account of——— is governed by this article. 14 C. 457.

(22) Money repayable on a contingency :—

A suit to recover money deposited by the plaintiff with the defendant, upon the understanding that it will be returned in a certain event, falls under this article, and not under art. 115. Limitation begins to run on the happening of the event. 5 C. 890=6 C.L.R. 355.

(23) Money obtained by fraud and collusion :—

A suit for recovery of money obtained by fraud and collusion is a suit for money received by the defendant for the plaintiff's use, and must be brought within three years of the date when the money was received. 2 C. 893.

(24) Suit by one decree-holder against another :—

A suit by one of two joint decree-holders to recover his share of the decree-amount against the purchaser of the decree from the other decree-holder, the purchaser having executed the decree, would—if he had any cause of action against the purchaser,—be for money had and received for plaintiff's use, and would be governed by this article. 2 C.L.R. 165.

(25) Suit by one joint-creditor against another :—

Where two out of three joint-creditors received from the debtor more than what was due to both of them jointly, the cause of action, for a suit by the third to recover the excess collected, would begin from the date of such excess collection. 9 B.L.R. 348=16 W.R. 20 (P.G.)

(26) Suit to recover over-payment :—

Where money was paid in excess of what was due in pursuance of a contract, a suit to recover back the money so over-paid is governed by this article and not by art. 145. 25 W.R. 415.

(27) Suit by one co-heir against another :—

A suit by plaintiff for recovery of his share of the rent of a certain land; he and the defendants being jointly entitled to the whole rent and the defendants having received the whole amount, is governed by this article. 10 M. 69 (73); following 3 A. 170.

(28) Suit for share in debt covered by a partition-decree :—

Where, after a partition-decree in plaintiff's favor, his father realized the whole of a debt due to the family and covered by the partition-decree, and the son sued the father for recovery of his portion of the amount realized, the suit was held governed by this article. 6 M. 402.

(29) Suit against representative of agent for account :—

Whether this article or art. 120 applied, a suit instituted within three years from the date of the agent's death, against the representative of the agent for an account of money received by the agent, is within time, the cause of action arising from the date of the death of the agent. 96 P.R. 1886.

1.—‘Money received by the defendant for plaintiff's use.’—(contd.)**A.—Suits falling under this article.—(concluded).****(30) Ward against guardian—Suit for specific sums received :—**

This article is applicable to a suit, by a ward against the guardian, to recover specific sums received during plaintiff's minority, such a suit not being one for an account. 56 P.R. 1883.

(31) Badni transaction :—

A suit to recover advances made in a ———— which is one in the nature of a gambling transaction depending on the rise and fall of the market, is governed by this article. 194 P.R. 1882.

(32) Suit for refund of ferry tolls illegally collected :—

A ———— by a lessee, in excess, under an honest mistake that he was entitled to make the excess collection under Act XVII of 1878, may be governed by this article or article 96. But the defendant may also claim the benefit of art. 2. 65 P.R. 1886 & 123 P.R. 1886.

(33) Suit for refund of money-decrees since superseded :—

A suit for refund of excess collections of rents made under a decree for enhancement of rent and other decrees following such decree, the controlling decree being subsequently reversed and superseded on appeal to the Privy Council, will lie. Such a suit may fall under this article. 3 C. 30 (F.B.).

(34) Suit under Civil Procedure Code, S. 295 :—

(a) A ———— by a mortgage-decree-holder for recovery of sale-proceeds paid to defendant under a wrong order of the Court, is governed by this article. 1 A. 333 (F.B.); 15 B. 438.

(b) *Per* STUART, C. J. and SPARKIE, J. :—Such a suit is one falling under art. 120 of the present Act (=art. 118 of Act IX of 1871).

(35) Voluntary payment :—

Money paid under compulsion, (*e.g.*) to prevent an impending sale of property purchased by plaintiff, is not a voluntary payment. 15 C. 656.

Compare 20 M. 23 & 26 M. 686=13 M.L.J. 83, (Case No. 2 under heading No. 2, under art. 61 *supra*).

B.—Suits not falling under this article.**(1) Suit by client against pleader's heir :—**

A suit by a client to recover, from the legal representative of a deceased pleader, money received by the pleader on behalf of the client, is governed by art. 120, and not by this article or by art. 89. 25 A. 55.

(2) Suit for money paid by a pre-emptor :—

A suit by a pre-emptor for recovery of money paid by him under a decree for pre-emption which subsequently became void for default in payment of balance of pre-emption amount within a given time, *held* governed by article 97 or art. 120, and not by this article. 8 A. 273=6 A.W.N. 95.

I.—'Money received by the defendant for plaintiff's use.'—(contd.)

B.—Suits not falling under this article.—(continued).

(3) Suit to enforce equitable claim :—

(a) A ——— in respect of moveables wrongfully converted by a deceased person, against whom a decree had been obtained, such proceeds being held by the defendant as agent of the representative of the deceased, is not governed by this article, but by art. 120; because such a suit is really one to enforce an equitable claim, on the part of the plaintiff, to follow the proceeds, for which there is no specific article in the Act. This article does not apply to such a suit. 10 C. 860 = 11 I.A. 59 (P.C.).

(b) A suit based on an equitable claim, against a trustee, for possession of share and for account and recovery of profits, is not governed by this article. 7 A. 25. 4 A.W.N. 319: [Referring to 10 C. 860, (P.C.).]

(4) Suit for residue of sale-proceeds :—

A suit to recover the residue of the sale-proceeds of an estate sold for arrears of Government-revenue is governed by art. 120 and not by this article (if the case be not governed by S. 10.—*Per FROST, J.*) 20 C. 51 (F.B.).

(5) Suit for compensation-money :—

(a) Where compensation-money, paid by Government for land taken up for public purposes, was drawn by a *mokurari* lessee, a suit by the owner against such lessee for recovery of the amount was held not to fall under this article but under art. 120. 5 C. 597 = 5 C.L.R. 45.

(b) In execution of his money-decree, a decree-holder attached some property. A claim was preferred and the property was released from attachment. The decree-holder, in a regular suit brought by him, obtained a declaration that the property belonged to the judgment-debtor. In the meantime, the property was taken up by Government for public purposes and the compensation-money was paid to the claimant. The decree-holder having attached and sold this amount as debt due to the judgment-debtor, plaintiff purchased the same and now sued the recipients of the amount from the Government. Such a suit was held not one falling under this article, but one under art. 120. 15 M. 382.

(6) Money paid through fraud or mistake :—

A suit for compensation-money paid to defendant under the Land Acquisition Act, either through fraud or mistake, is not governed by this article but by art. 95 or 96; and time begins to run from the date of plaintiff's discovery of the fraud or mistake. 6 M. 844 (350).

(7) Sale not void *ab initio* but subsequently failing :—

A suit for recovery of purchase-money paid for a sale, which being valid at its date, subsequently fails on account of want, or defect, of title in the vendor, is governed by article 97, as one for recovery of money on failure of consideration, and not by this article. The starting point of limitation in such a case is not the date of the sale, but the date on which it fails. 18 M. 173 = 5 M.L.J. 82; 19 C. 128 (P.C.); 8 A. 214.

1.—‘Money received by the defendant for plaintiff’s use.’—(contd.)**B.—Suits not falling under this article.—(concluded).****(8) Suit for excess rent paid :—**

A suit for a refund of the excess rent paid in consequence of a decree since reversed, is not governed by this article, but by art. 120. 2 C.L.R. 354.

(9) Suit by purchaser at execution-sale :—

A——for recovery of money paid by him for the purchase, on the ground of want of title in the judgment-debtor, is governed by art. 120, and not by this article. 16 M. 361 = 3 M.L.J. 364.

(10) Suit for money received under a subsisting decree since reversed :—

A suit by a surety to recover money which he had realized by summary process under S. 583, C. P. Code, but which defendant intercepted under colour of a decree subsequently reversed, is not governed by this article but by art. 120. 13 M. 437.

(11) Suit by co-sharer against lambardar for profits :—

A suit by a co-sharer proprietor of a village against a Lambardar co-sharer for his share of the profits is, in its nature, a suit for an account, and is governed by art. 120, and not by this article or by art. 89. 10 C.P. L.R. 98.

(12) Suit by ward against guardian for account :—

A suit by a ward against the guardian for an account of the profits made by the latter during the former’s minority is not governed by this article, but by art. 120. 84 P.B. 1891.

(13) Excess road cess :—

A suit for recovery of money alleged to have been paid in excess of the sum demandable by defendant from plaintiff on account of road-cess and public works cess is governed by article 96, and not by this article. 12 C. 533.

2.—‘When the money is received.’

As to when time begins to run, see :—Nos. 4, 6, 7, 8, 9, 11, 22, 23, 25, 29, under heading 1 (A), and Nos. 6 and 7 under heading 1 (B), *supra*.

General.**Right unaffected by S. 72 of the Contract Act :—**

A right to recover money had and received for plaintiff’s use is unaffected by S. 72 of the Contract Act. 25 M. 548.

63.—For money payable for interest⁽¹⁾ upon money due from the defendant to the plaintiff. **Three years.** When the interest becomes due⁽²⁾.

(Old Acts.)

[Art. 61 of Act IX of 1871.—Same as above.

S. 1, cl. 9 of Act XIV of 1859 ---No provision exactly corresponding to this article.
The one very nearly approaching it is that contained in s. 1, cl. 9.]

(Notes)

Scope of article.

Suit for interest on account stated :—

Where an account stated shows a balance representing the principal sum deposited with a bank and interest thereon calculated at a certain rate and then the debtor-bank offers to pay, and does pay, the principal and interest calculated at a less rate, and the creditor sues for the difference between the interest mentioned in the account stated and that actually paid, the suit is one falling under this article. 3 A. 328.

1.—‘For money payable for interest.’

(1) Interest separately covenanted for :—

If a deed of mortgage covenants for payment of interest separately and independently of the payment of principal, as some well-known English mortgage-deeds do, the mortgagee may sue for overdue interest alone, without calling in the principal even after it becomes due, the cause of action for interest in such cases being independent of that for the principal. 21 B. 237 (271); *Cf.* 12 A. 203.

(2) *Post-diem* interest :—

Whether *post-diem* interest is or is not payable, depends entirely upon the intention of the parties to a contract, to be gathered from its terms. If it is their intention that interest should continue to be paid even after the due date, the amount accruing due may be recovered as interest. If such is not the intention, it may be recovered as damages so long as the principal remains unpaid and unbarred : such damages may be recovered for six years before suit, the cause of action accruing every moment of the time during which the principal remains unpaid. 19 A. 39 (P.C.) = 23 I.A. 138 [*overruling* 17 A. 581 (F.B.)]. Compare 73 P.R. 1892.

(NOTE).—*Sec* 25 C. 246, on the point that the determination as to whether *post-diem* interest is or is not payable is dependent on the intention of the parties to be gathered from the terms of the contract between them.

(3) *Post-diem* interest—damages :—

Where no provision is made for *post-diem* interest, interest is claimable and calculable by way of damages ; and such damages cannot be recovered as a charge on the property mortgaged, if any. If the deed is registered, it is recoverable for six years before suit. 13 A. 330 ; 10 A. 85 ; 11 A. 416 ; Compare 1 A. 603 ; Compare also 19 C. 19 and 6 C.P.L.R. 22.

1.—‘For money payable for interest.’—(continued).

(NOTE).—In the above cases (13 A, 10 A and 11 A.) it was decided that in such cases there is but one breach of contract on non-payment of principal on the due date and there is no question of continuous or successive breaches. So far as this point is concerned, the Privy Council holds that there is a continuous breach [*vide* 19 A. 39 (P.C.)=23 I.A. 138] : Compare 2 C.W.N. cvii.

(4) *Post-diem* Interest—Instalment-bond :—

Though an instalment-bond contains no express provision for payment of interest after the date of default, still the Court will be justified in granting interest so long as the principal is improperly withheld, as, otherwise, default in payment of principal would result in an undue advantage to the debtor. 23 M. 534.

(5) *Post-diem* Interest—Conditional sale :—

Where no provision is made in a deed of conditional sale for payment of interest after due date, the claim for *post-diem* interest is a claim for compensation for breach of contract; limitation would run from the date of default, the period of limitation being six years. It cannot be charged on land mortgaged. 19 C. 19.

The same rule applies in the case of a bond. 8 C.P.L.R. 95.

See also 18 M. 257=2 M.L.J. 235, (at pp. 261 and 262), and 18 M. 331 on the same point. These cases also decided that such damages cannot be charged on the property mortgaged, if any.

(6) Interest due on mortgages :—

In the case of mortgages the limitation applicable for interest is the same as that for the principal. 101 P.R. 1880.

(7) Interest by way of damages :—

When interest is allowed by way of damages, the *quantum* of damages is left to the discretion of the Court and the standard by which such damages should be measured will depend upon the circumstances of each case. 8 A. 486.

(8) Interest awarded as damages :—

—cannot be recovered for more than six years before suit. To such cases, art. 120 applies. 5 C.W.N. 356.

(9) Enhanced rate of interest :—

Where a mortgage-deed contained a stipulation for enhanced rate of interest after due date, the mortgagee is entitled to recover interest by way of damages for only six years before suit. 2 C.W.N. cvii.

(10) Act XXVIII of 1835, (Interest Act) :—

Where interest at a certain rate is fixed in a bond, Courts must allow interest at such rate up to the date of decree. 8 M. 125 and 12 M. 425 [*disenting from* 12 C. 569 (F.B.)]; 3 A. 91 (107) (P.C.)=7 I.A. 126.

1.—‘For money payable for interest.’—(concluded).

(11) Interest Act, XXXII of 1839 :—

- (a) When a bond makes no provision for payment of interest after the due date, interest is payable by virtue of———. The period of limitation is six years. 24 C. 699 ; 21 C. 274.
- (b) Such amount, allowed under Act XXXII of 1839, will not be a charge on the land mortgaged, if any. 18 M. 257 ; 24 C. 699 (F.B.): Cf. 19 C. 19, 10 A. 85.
- (c) See, *contra*, 18 M. 248, and TREVELYAN and BANERJEE, JJ., in 24 C. 699 and 21 C. 274, where it is held that it is chargeable on land owing to the combined effect of the Interest Act XXXII of 1839 and s. 88 of Act IV of 1882.

(12) Damdupat :—

See 3 B. 312, p. 392, as to the applicability of the rule of *damdupat* in a case of a mortgage by a Hindu where no account of rents and profits is to be taken.

(13) Right to interest when principal barred :—

When the principal is barred, no claim can be put forward for interest, which is only accessory thereto. 27 B. 390 ; 5 C. 750 (765).

See also 1 M. 228, where the same question is discussed.

(14) Interest charged on land :—

Where interest is charged on land, as in a mortgage, such interest may be recovered for twelve years. 6 M. 417 (6 B. 719).

(15) Interest in redemption-suit :—

In a redemption-suit, the mortgagor is entitled to interest from the date of the bond up to the date of decree, and not merely up to six years from the date of the bond; because the law fixes no limit of time for the payment of interest to a mortgagee. 14 B. 118 (12 B.H.C. p. 88).

(NOTE).—The suit, in this case, was based on a mortgage of 1833 and the suit was brought in about 1883 or 1884.

Compare 147 P.R. 1890 (F.B.), *overruling* 57 P.R. 1888 and *approving* 8 P.R. 1890.—This F.B. decides that the mortgagor cannot avail himself of the provisions of art. 132, so as to obtain redemption on payment of the principal and so much of the interest only as has accrued during the twelve years before suit.

(16) Foreclosure suit :—

In a foreclosure suit, interest should not be added to the mortgage money. 6 C.P.L.R. 22.

2.—‘Becomes due.’

Meaning of the word ‘due’ :—

The word ‘due’ means due under a contract express or implied. Interest assessable by a Court as damages and not payable under a contract, is not interest ‘due’—*Compare* 17 A. 581 at pp. 587, 588, and the remarks at 25 M. 608 (612)—See also Mitra’s Limitation, p. 861 (4th Edition) : *Compare* also, the remarks of SUBRAMANIA AYYER, J. at p. 394 of 18 M. 391.

- 64.** — For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated⁽¹⁾ between them. *Three years.* When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing⁽²⁾ signed as aforesaid, made payable at a future time, and then when that time arrives.

(Old Acts).

[Art. 62 of Act IX of 1871.—Column 1 and 2, same as above. Col. 3: When the accounts are stated, unless where the debt is made payable at a future time and then when that time arrives.

Act XIV of 1859. —No corresponding provision.

(Notes)

Scope of article.

Money deposited by Plaintiff:—

If a defendant holds, as trustee, money sent by plaintiff in deposit, the case will fall not under this article, but under article 60. 28 C. 893.

I.—‘Account stated.’

(1) Definition of ‘account stated’:—

- (a) An ‘account stated’ is one where several cross-claims are brought in account on either side and are set off against each other and a balance is struck, the consideration for the payment of the balance being the discharge on each side. Such an account stated evidences a new contract. 23 A. 502; 7 O.C. 166; 7 B. 414 (417); 11 C.P.L.R. 65; 2 C. P.L.R. 40. *But compare*, 26 M. 186=12 M.L.J. 444.
- (b) The striking of a balance in an account, the items of which are all on one side, does not amount to an ‘account stated.’ The signature of a debtor to such a balance is nothing more than an acknowledgment of a debt. If, therefore, the debt is barred at the date of the acknowledgment, the latter cannot help to extend the period of limitation in favor of the creditor. 15 A. 1=12 A.W.N. 215 (*following* 7 B. 414); 13 A.W.N. 84. *Cf.* 9 B. 516.
- (c) When the account consists of only one item on the debit side containing the signature of the debtor, it will only be an acknowledgment and not ‘an account stated.’ 9 B. 516.
- (d) An ‘account stated’ is an adjustment of account assented to by both parties. 6 C. 447 (451)

1.—‘Account stated.’—(continued).

- (e) A mere acknowledgment of a balance struck is not an ‘account stated’ within the meaning of the article; nor does it form the basis of a fresh contract. 3 A. 581; A.W.N. (1881), 65; 6 M.H.C. 197; 23 A. 502, following 15 A. 1=12 A.W.N. 215 and 22 B. 513; and *distinguishing* 2 A. 641; 2 A. 872; 3 A. 148; 3 A.W.N. 47.]

(2) Difference between ‘account stated’ and ‘acknowledgment’ :—

————— Sep 7 B. 414.

(3) Razu or adjustment of account :—

- (a) The “*razu*” or adjustment of an account can operate either as a revival of an original promise or as evidence of a new contract. As an acknowledgment, it would have no effect under S. 19 of the Act, if it were not made in writing and signed before the expiration of the period of limitation prescribed. If it is relied on as furnishing a new cause of action, it must contain a promise in writing, such as is required by S. 25, clause 3 of the Contract Act—a bare statement of an account not being such a contract. 6 B. 683.

- (b) A ——— cannot be sued on as a fresh contract. It can only serve to prevent the operation of the Act of limitation. 22 B. 513.

(4) No necessity for reciprocal demands :—

In order to bring an ‘account stated’ within the article, it is not necessary that there should be reciprocal demands between the parties. 26 M. 186=12 M.L.J. 444.

Compare 23 A. 502 and 22 B. 513.

(5) Mere acknowledgment not promise to pay :—

A bare acknowledgment under S. 19 of the Limitation Act does not imply a promise to pay on which a right of suit can be based. An account so acknowledged is not an ‘account stated.’ 11 C.P.L.R. 65.

(6) Unsigned statement of account :—

A suit based upon a statement of account not signed by the defendant would not fall under this article. 10 C. 284 (296)=13 C.L.R. 445 (F.B.).

(7) A verbal statement of account followed by verbal promise :—

- (a) An ‘account stated’ will be a substantive cause of suit in itself, only when it is in writing and signed by the defendant; and a promise to take a debt out of the operation of the Limitation Act must be in writing. A mere examination of account, followed by a verbal promise to pay the balance found to be due, cannot save a claim barred by limitation. 16 M. 389.

- (b) A settlement of accounts between two partners, followed by the verbal promise of one of them to pay the balance found due to the other, affords a good cause of action for a suit, the promise being a contract supported by good consideration. 21 M. 366.

1.—'Account stated.'—(concluded).

Compare 7 C. 256—8 C.L.R. 583, which decides that this article is applicable whether the accounts are stated verbally or in writing; and 10 C. 284, which decides that this article is not applicable to accounts stated verbally; and 10 C. 1083 and 20 P.R. 1883 which decide that art. 115 is applicable to all contracts which are not in writing registered, and not otherwise specifically provided for.

(c) A verbal promise to pay, even when it is on a settlement of account, cannot save limitation. 6 M.H.C. 51.

(NOTE).—This was a case before Act IX of 1871.

(8) Memorandum in creditor's book signed by debtor :—

A———, which acknowledges that a specified amount is to be received by the creditor with interest and that another specified sum is to be received on a fixed date contains an implied promise to pay and can form the basis of a suit. 3 P.R. 1878 (F.B.) (followed in 33 P.R. 1882.)

(9) Addition of small and unauthorised items :—

A person could not, by adding small and unauthorised items in certain months and delivering his account subsequently, renew the statement of account up to the date of delivering the account so as to give him the benefit of this article. 5 C. 759.

(NOTE).—This was a case under art. 62 of Act IX of 1871.

(10) Statement of account by guardian :—

Unless the act of guardian in the matter of the settlement of accounts is beneficial to the interests of the minor, a suit against the latter upon an account stated by his guardian cannot succeed. 13 C.L.R. 112.

(11) Power of partners to sign accounts of indebtedness :—

It is competent for one partner to sign an account in acknowledgment of indebtedness and thereby bind his co-partner. 26 M. 186.

(12) Accounts settled—registered partnership deed :—

A suit by one partner against another (both trading under a registered partnership deed which provided by whom and in what proportions the loss, if any, in the business should be borne) for the defendant's share of loss in the business, *held* governed by art. 116 and not by this article, notwithstanding the fact that accounts were settled between the plaintiff and defendant. 14 M. 465—1 M.L.J. 482. Compare 12 C. 357 and 3 M. 76.

2.—'Simultaneous agreement in writing &c.,'

(1) Oral agreement :—

In order that the plaintiff may have an extended period of limitation, the simultaneous agreement to pay the amount found due at a future time must be 'in writing' and signed by the defendant or his agent: otherwise, the claim would be barred after three years from the statement of account. 25 A. 67; 3 B. 542.

2.—‘Simultaneous agreement in writing &c.’—(concluded).

(2) Suit against Hindu sons on accounts stated by father :—

If the suit could not be in time, if brought against the father on a settlement of accounts, it would be barred against the sons, unless the latter were sought to be made liable on the ground of a pious duty on them to pay the debt of their father or unless they had given an acknowledgment in writing which could have the effect of giving an extension of time. There could be no such pious duty where the sons were divided from their father at the date of the settlement. 25 A. 67; *compare* 23 A. 206.

(3) Kistbandi :—

A ———, or petition presented to Court signed by the defendant, whereby the defendant agreed to pay a certain decree-debt in certain instalments, with a proviso that the whole amount should be exigible in case any one of the instalments is not paid on the due date, may be regarded as a statement of an account in writing falling within this article. 8 C. 912 (914).

(4) Difference between the old Act and the present Act —

Under the old Act (IX of 1871), the accounts need not necessarily be stated in writing to give a starting point of limitation; but, under the present Act, the statement of accounts must, in order to give a fresh start of limitation, be in writing and signed by the debtor or his agent. An unwritten and unsigned statement of account cannot fall under this article and cannot give a starting point from the date of the statement. 3 A. 148 (F.B.); 2 A. 872; 1 A.W.N. 29; 2 C.L.R. 346.

(Note).—See the same cases, 3 A. 148 (F.B.) and 2 A. 872, at p. 580, *supra*, noted under S. 2.

(Old Law.)

(Note).—The following cases bore on the law as it existed before the enactment of the present Act. They are inserted here to help the reader in knowing what the state of the Law was before this Act.

(1) Verbal admission of correctness of account :—

A ———, the items of which are barred by limitation, does not furnish a new starting point of limitation. 3 M.H.C. 378. *Cf.* 4 W.R.S.O. Ref. 1.

(2) Account between principal and agent :—

Where a settlement of accounts was made between a commission agent and his principal and a certain amount was found to be due by one to the other, the date of such settlement of accounts would be the starting point from which limitation could be counted. 24 W.R. 440.

(3) Settlement of cross-claims :—

An unsigned adjustment and settlement of accounts would save limitation, provided there be cross-demands. 9 Bom. H.C.O.C. 429.

(4) Adjusted account signed by debtor :—

A suit to recover the balance of an account adjusted and signed by the defendant fell within the provisions of cl. 16, s. 1, Act XIV of 1859, and not under cl. 9, s. 1, of that Act. 5 Bom. H.C.O.C. 16.

(Old Law).—(concluded).

(5) **Running accounts:—**

In a running account between the plaintiff and the defendant, the former was entitled to recover only the advances made by him within three years preceding the institution of the suit. 8 Bom. H.C.A.C. 6.

(NOTE).—This was a case under Act XIV of 1859.

(6) **Items in account within three years of suit:—**

Where accounts were stated, a suit to recover items of the debt due within three years before suit, might be brought without reference to any acknowledgment in writing. 7 N.W.P.H.C. 105.

(7) **Accounts between landlord and tenants:—**

Where, on an adjustment of account between a landlord and a tenant, a balance was found to be due from the tenant, an action to recover such balance with interest was not a suit for arrears of rent under Act VIII (B.C.) of 1869, but fell within the provisions of art. 62, Act IX of 1871. 24 W.R. 218.

(8) **Interpretation of s. 4 of Act XIV of 1859:—**

(a) S. 4 of Act XIV of 1859 applied to what was merely an acknowledgment of a debt being due, and not to a writing by which time was given for payment of the debt, in which case, s. 1, cl. 10 became applicable. 17 W.R. 406.

(b) Where a statement of balances, though verified, was not signed by the defendant, such statement was not an acknowledgment within the meaning of s. 4, Act XIV of 1859. 10 W.R. 293.

65.—For compensation for breach *Three years.* When the time specified of a promise to do any thing at a specified time, or upon the happening of a specified contingency.⁽¹⁾ ed arrives⁽²⁾ or the contingency happens.

(Old Acts.)

[Art. 63 of Act IX of 1871.—Same as above, except that, instead of the words 'for compensation for breach of' in the first column, there was the word 'upon,' and for the words 'when the time specified arrives &c. in the third column, there were the words 'At the time specified or upon the contingency happening.'

S. 1, cl. 9 of Act XIV of 1859.—'To suits * * * or for the breach of any contract—the period of three years from the time * * * when the breach of contract * * * took place.'

(Notes)

1.—'For compensation for breach of a promise &c.'

(1) **Remedy barred against principal debtor barred against surety:—**

(a) Where a judgment-creditor allows his remedy as against the judgment-debtor to become barred by the law of limitations, he will forfeit his remedy as against the surety also. 24 A. 504.

(b) Where a person becomes a surety by promising to discharge a debt in the event of the principal debtor not paying the same, a suit against the surety to recover the debt would be barred, if the personal remedy as against the principal-debtor has become barred. 9 A. 205 (210).

But see 12 C. 30 and 5 B. 647, which decide that, if a suit against the principal debtor is barred, it will not necessarily be barred against the surety.

Compare 4 C.L.R. 84, where the facts were that, a certain person having become a surety for repayment by another of a certain sum of money lent to the latter, a suit was brought against both the principal debtor and the surety, though it was clearly barred against the former. It was held that the Court ought to find upon the evidence when a demand was made on the surety and then apply this article.

(2) **Suit on mortgage deed for personal remedy:—**

A suit, based on a mortgage-deed, for personal remedy alone will be barred, if brought more than three years from the date fixed in the deed for payment, in the case of an unregistered deed, and, if brought more than six years, in the case of a registered deed. 7 A. 502 (P.C.)=12 I.A. 12; 10 M. 100; 12 C. 389.

(3) **Suit for kattubadi praying for personal remedy:—**

In the case of a———, held the claim could be allowed only for three years' arrears. 15 M. 161.

(4) **How to determine whether a suit is for personal remedy:—**

Whether a suit is to enforce a personal remedy only or one to enforce a charge on immoveable property, is to be determined on the facts of each case. If it unequivocally appears that the plaintiff's intention is to enforce a personal remedy, it will be governed by this article. Otherwise, article 132 will apply. 7 O.C. 108.

(5) **Suit for refund of purchase-money:—**

A. ——— in a case where the land proved deficient in quantity, held, the suit was governed by this article but that, as the deed was registered, art. 116 applied. 3 A. 712=1 A.W.N. 67.

(6) **Conversely:—**

A suit by a vendee to recover damages in the shape of difference between profit guaranteed of a land sold and the profits actually realized from the land purchased. 16 A.W.N. 15, 18 A. 160.

(7) **Suit by one mortgagee against co-mortgagee:—**

Where one of two mortgagees consented to the deed of mortgage being renewed in favor of his co-mortgagee alone on the promise of the latter to pay

1.—‘For compensation for breach of a promise &c.’—(concluded).

the former the amount due to him, a suit by the former against the latter for recovery of the amount promised, should be based on the agreement between the two, by which the mortgage was renewed. 3 A.W.N. 129.

(8) Breach of contract to indemnify :—

A suit for compensation for ——— is governed by this article. 12 Bom.H.C. A.C. 238.

2.—‘When the time specified arrives.’

Suit filed before the time fixed :—

Where a person promises to do a certain thing at a certain time and, before the lapse of that time, he expressly declares his intention not to do that thing, there is nothing to prevent the promisee to file a suit against such person before the lapse of that time. 1 M.H.C. 162.

66.—On a single bond, where a day *Three years.* The day so specified⁽²⁾ is specified for payment.⁽¹⁾

(Old Acts)

[Art. 65 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—‘On a single bond where a day is specified for payment.’

(1) Single bond, definition of :—

(a) A ‘single bond’ is that which is a bill or written engagement for payment of money without a penalty. A deed of mortgage by conditional sale, whereby certain property is mortgaged with a condition superadded, that, in the event of default at the specified date, the mortgagee shall be at liberty to sue for absolute proprietary right, treating the mortgage-debt as consideration for the sale, is not such a bond. A suit thereon for money, on the personal liability of the debtor, does not fall under this article. 4 A. 3 = 1 A.W.N. 93.

(b) A ‘single bond’ means a simple bond without alternative conditions, or penalty attached. It is an absolute engagement in writing for the payment of money. The contrast is between this article and arts. 67 and 68, which deal with bonds subject to conditions. 26 P.R. 1892.

(c) Where a document provided for payment of principal and interest at a certain time and, on default, to pay interest at the specified rate till payment, the document was not a single bond within the meaning of arts. 66 and 67; and a suit to recover the amount due under it fell within art. 68 or 80, the cause of action having commenced to run from the date of default of payment at the specified time. 138 P.R. 1890.

1.—‘On a single bond where a day is specified for payment’—(contd.)**(2) Bond not a mortgage-bond :—**

Where a bond fixes a date for payment and it is not possible to treat it as a mortgage of immovable property, it may be regarded as a single bond for the payment of money at a specified date. If it is registered, the suit thereon for recovery of money secured thereby, enforcing personal remedy, will fall under art. 116; and if unregistered, it will fall under this article. 14 A. 162; see also 6 C. 94.

(3) Bond specifying date for principal :—

Where, in a bond, a day is specified for payment of the principal amount, a suit on the bond would be governed by this article and not by art. 75, and would be in time if brought within three years from the date specified. 5 C. 21.

(4) Registered bond payable within so many years :—

A registered bond payable ‘within two years,’ but not fixing any particular date for payment, is not a ‘single bond where a day is specified for payment’ within the meaning of this article, because it is left to the option of the debtor to make the payment at any time within three years. To a suit on such bond, article 116 will apply. 3 A. 276; 2. A. 322: [Compare 5 B. 22, which decides that the use of the words ‘within so many years’ is not a sufficient indication of the intention of the parties that the mortgagor might redeem in a period less than the number of years mentioned: [See 4 C W.N. OXI, which decides that, where an agreement contains a stipulation to pay on or before a certain date, the time for payment is not uncertain but fixed.

See also, 75 P.R. 1875, which decides that, in a suit on a bond payable *within one year*, the cause of action arises after the expiration of one year, and not from the date of the execution of the bond.

Compare also, 2 U.B.R. (1892—96), 470 and 473.

(5) Bond not providing for payment on a specified date :—

A usufructuary mortgage-deed, providing for payment of the amount borrowed within ten years, and authorizing the mortgagor to re-enter into possession when he pays the amount after the ten years, is not a bond within this article, no specific date having been fixed for repayment. 16 B. 303.

(6) Bond payable when another bond is paid :—

A bond providing for payment of the amount thereof when payment was to be made on another bond or deed by the defendant to the plaintiff, does not fall under this article, no particular date being fixed for payment. 8 A.W.N. 234; see also 189 P.R. 1889 on the same point.

(7) Suit against agriculturist surety :—

Where an agriculturist co-defendant is sued merely as surety to a principal debtor on an unregistered money-bond, the limitation applicable is only three years, and not six years allowed by S. 72 of Deccan Agriculturists’ Relief Act XVII of 1879. 9 B. 461.

2.—‘The day so specified.’

(1) Month not having the date specified in the deed :—

Where a bond provided for payment on the 30th day of a certain month in a certain year and the month of that year had had one day less, a suit instituted on the next day after the last day of that month was in time. 6 C. 239 = 6 C.L.R. 553. So also a suit for rent, based upon a lease and under the above circumstances, was held not barred. 17 M. 61. See, 14 A. 162 under art. 64.

(2) Suit for personal remedy on mortgage bond :—

See, 7 A. 502 (P.C.) = 12 I. A. 12 under art. 65.

Compare 7 C. 256 noted under art. 64.

Old Law.

In the corresponding article (65) of Act IX of 1871, the word *bond* included a *tanasukh*. 3 P.R. 1874 and 6 P.R. 1874.

But this was doubted by a majority of the Full Bench in 77 P.R. 1879.

Act XIV of 1859.—

- The period of limitation to suits upon unregistered written instruments, was three years. 5 M.H.C. 68.

(NOTE).—This was a case under cl. 10, S. 1 of Act XIV of 1859.

67.—On a single bond, where no *Three years*. The date of executing such day is specified. the bond.

(Old Acts.)

[Art. 66 of Act IX of 1871.—Same as above.

Act XIV of 1859 —No corresponding provision.]

(Notes.)

(1) Bond executed under old Act :—

For a suit on a bond payable on demand, the cause of action under the old Act (IX of 1871) arose on the date of the demand, whereas under the present Act, it arises on the date of the execution of the bond. So, a suit on a bond payable on demand and executed when Act IX was in force, brought within two years after the present Act came into force, was held to be in time. 3 A. 415.

(NOTE).—As to whether the period allowed by the present article on bonds payable on demand is shorter or longer than that allowed by the old Act, see, 1 M. 301 and 2 M. 113, under Heading B. under S. 2, at pp. 532 and 533 *supra*.

(2) Bond payable when another bond is paid :—

See Note No. 6. 8 A.W.N. 234 and 139 P.R. 1889, under art. 66 : and see Notes, Nos. 1(a), 1(b), and 1(c), under art. 66 *supra*, as to the definition of ‘single bond.’

(3) Suit against surety .—

Art. 67, and not this article, is applicable to a case where a surety promises to pay a sum of money on the disposal of a pending appeal. 1 C.W.N. cccxiii.

68.—On a bond subject to a condition. *Three years.* When the condition is broken.

(Old Acts.)

[Art. 67 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

The language of this article has to be contrasted with that of articles 66 and 67, and the decisions 1(a), 1(b) and 1(c), noted under art. 66 *supra*, have to be read along with this article.

(1) **Agreement with covenant for damages :—**

An agreement containing a covenant to do a particular act, the breach of which is to be compensated in damages, is not a 'bond.' 8 C. 284.

(2) **Bond providing for penalty :—**

A document providing for payment of a penalty in case of the breach of the conditions therein, on the part of the obligor, is a "bond." 2 A. 654 (F.B.): STUART, J., however, held, that such a document is not a "bond."

(3) **Bonds subject to conditions :—**

See 26 P.R. 1892 and 188 P.R. 1890 noted under art. 66 at p. 798, *supra*.

69.—On a bill of exchange or *Three years.* When the bill or note promissory note payable at a fixed time after date. falls due.

(Old Acts.)

[Art. 68 of Act IX of 1871.—Same as above.

Act XIV of 1859. —No corresponding provision.]

(Notes.)

(1) **Suit on a dishonoured hundi :—**

A suit based on a dishonoured *Hundi* payable at a fixed time after date, but which had never been presented for acceptance, but only for payment, is not governed by this article but by art. 80, the cause of action arising from the date the *hundi* became payable. 19 P.R. 1888.

(2) **Suit to recover money paid for another—suit on a pre-note :—**

The plaintiffs borrowed money on a *hundi* payable so many days after date and paid the same to the defendants. The latter having committed default, plaintiffs paid the money to the drawer; but the *hundi* was not endorsed to the plaintiffs. A suit by the plaintiffs against defendants for the money was held governed by article 61 and not by this article. 5 Bom. L.R. 725.

(NOTE).—See same case noted under Heading No. 1, under art. 61 at p. 790, *supra*.

- 70.**—On a bill of exchange payable at sight, or after sight but not at a fixed time. *Three years.* When the bill is presented.

(Old Acts.)

[Art. 69 of Act IX of 1871.—Col. 1,—on a bill of exchange payable at or after sight. Cols. 2 and 3.—same as above.]

Act XIV of 1859.—No corresponding provision.

- 71.**—On a bill of exchange accepted payable at a particular place. *Three years.* When the bill is presented at that place.

(Old Acts.)

[Art. 70 of Act IX of 1871.—Same as above.]

Act XIV of 1859.—No corresponding provision.

- 72.**—On a bill of exchange or promissory note payable at a fixed time after sight or after demand. *Three years.* When the fixed time expires.

(Old Acts.)

[Art. 71 of Act IX of 1871.—Same as above.]

Act XIV of 1859.—No corresponding provision.

(Notes)**After six months after demand :—**

Where a pro-note was made payable “after six months after demand” it was held that limitation began to run upon the expiration of six months from the date of the note. 7 Bom. H.C.O.C. 36.

(NOTE)—This was a case under Act XIV of 1859.

- 73.**—On a bill of exchange or promissory note payable on demand⁽¹⁾ and not accompanied by any writing restraining⁽²⁾ or postponing the right to sue. *Three years.* The date of the bill or note.

(Old Acts.)

[Art. 72 of Act IX of 1871.—Cols. 1 and 2 same as above. Column 3,—When the demand is made.]

Act XIV of 1859.—No corresponding provision.

(Notes)

1.—'On demand.'

(1) Meaning of 'on demand':—

The words 'on demand' must be regarded as a technical expression equivalent to 'immediately' or 'forthwith.' When such is the intention of the parties, no actual demand is necessary to complete the cause of action. 20 M. 245 (248).

(2) Payable any time within six years on demand:—

A pro-note———does not fall under this article and is governed by art. 120. 6 M. 290.

(3) Pro-note payable on demand after majority:—

The period of limitation for a promise to pay a sum of money on demand, after the obligee attains majority, begins to run from date of demand after attainment of majority and not from the date of the document embodying the promise. 3 M.L.J. 199.

(4) Substitution of new contract:—

Where, for the balance of the amount due under a promissory note payable on demand, a new contract was substituted between the parties, the period of limitation for a suit to recover the balance was computed from the new contract and not from the date of the pro-note. 1 B. 503.

(NOTE).—This was a case under Act IX of 1871.

2.—'Not accompanied by any writing.'

When the note itself restrains suit:—

A pro-note payable 'any time within six years on demand' was held to contain within itself the terms restraining the suit unless the demand is made within six years, though there is no separate writing accompanying the note; but as this form of pro-note is not specifically provided for in the Act, it was held to fall under art. 120. 6 M. 290.

General.

(1) Period shorter than that under Act IX of 1871:—

The period of limitation allowed by the present article is shorter than that prescribed by Act IX of 1871. 2 M. 143.

(NOTE).—See this case and similar cases, 1 B. 305 (Note); 1 M. 264; 3 A. 415; 2 C.L.R. 426; 2 M. 397; 4 B. 87; 7 C. 401; 9 B. 475; 4 C.L.R. 102; 8 C.L.R. 248 noted under S. 2, *supra* under Heading B, at p. 532, *supra*.

(2) Commencement of time:—

The day on which a promissory note is executed ought to be excluded from calculation. 6 B.L.R. 392; 8 B.L.R. 24—6 W.R. O.C. 1.

(Old Law.)

(1) Limitation under Act XIV of 1859 :—

(a) Under Act XIV of 1859, the limitation for a pro-note payable on demand ran from the date of demand. 4 B. 230.

See, also, 7 M.H.C. 283, 288, 392.

(b) The period of limitation for a suit to recover money lent upon an agreement payable on demand began to run from the date of the loan. 2 M.H.C. 472.

(NOTE).—This was a case under Act XIV of 1859.

(2) Barred claim not revived :—

Where a promissory note payable on demand became barred while Act XIV of 1859 was in force, the right to sue on it cannot be revived by Act IX of 1871, which gave a different cause of action with reference to such promissory notes. 1 C. 328.

(3) Limitation under Act IX of 1871 :—

Under Act IX of 1871, limitation for a suit on a bill of exchange or promissory note payable on demand commenced at the time when the demand was first made. 10 B.H.C.A.C. 487.

74.—(On a promissory note or *Three years.* The expiration of the first term of payment, as to the part then payable; and, for the other parts, the expiration of the respective terms of payment.)
bond payable by instalments⁽¹⁾.

(Old Acts.)

[Art. 74 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Difference between arts. 75 and 76 :—

(a) The essential requisites of art. 75 are (1) that penalty should be attached to a simple default and (2) that the whole bond should then fall due. If either of these requisites be absent, a suit based upon an instalment bond would be governed by this article and not by art. 75. 74 P.R. 1901—111 P.L.R. 1901.

(b) This article applies to the case of an instalment bond, not providing for payment of the whole of the amount, in case of default. Art. 75 refers to an instalment bond, providing for payment of the whole amount, in case of default. 6 C.P.L.R. 24.

1.—'Bond payable by instalments.'

Registered instalment bonds :—

Notwithstanding the express provision of this article, art. 116 applies to suits based on registered instalment bonds. 18 C. 508.

- 75.**—On a promissory note or bond payable by instalments⁽¹⁾, which provides that, if default be made in payment of one instalment, the whole shall be due *Three years.* When the first default is made, unless where the payee or obligee waives the benefit of the provision⁽²⁾, and then when fresh default is made in respect of which there is no such waiver.

(Old Acts.)

[Art. 75 of Act IX of 1871.—Same as above, except that the words, 'in respect of which there is no such waiver' in the last column of present article, are new.

Act XIV of 1859.—No corresponding provision.]

(Notes.)

(1) Scope of article:—

The article is applicable to suits on promissory notes or bonds payable in instalments. It is inapplicable to execution-applications. The latter are governed by art. 179 (6). 4 A. 83 (84).

(2) Intention of article:—

The provision of this article, as to waiver, is intended to extend the period of limitation.

This article contemplates a suit for the whole amount of a bond, and not for whatever balance may remain after the deduction of certain instalments as to which default may have been made. 6 C.P.L.R. 24.

(3) Contrast between articles 74 and 75:—

Art. 74 deals with simple instalment bonds, without any provision as to the exigibility of the whole of the amount in case of default; if there be such a provision, art. 75 would be applicable. 6 C.P.L.R. 24; 111 P. L.R. 1901.

1.—'Promissory note or bond payable by instalments.'

(1) Instalment-bond, what is an:—

For a bond to be an instalment-bond, the amount borrowed, (i.e.) the amount secured by the bond, apart from the interest accruing due thereon, should be made payable in instalments. A bond providing for payment of interest half-yearly and the principal amount at a fixed date, cannot be an instalment-bond, notwithstanding the fact that there is a proviso in it to the effect that the creditor might enforce payment of the whole sum—principal and all—in a lump on default of payment of interest at the stipulated period. To a case of the latter kind, art. 80 or art. 66 will apply. 5 C. 21; 2 A. 322; 1 A.W.N. 157. Cf. 23 C. 228 —22 I.A. 183 (P.C.).

But see 20 M. 245, which decides that, in the case of a hypothecation bond, providing for re-payment of principal amount on a certain date, with interest in the meantime payable monthly, and further providing that,

1.—‘Promissory note or bond payable by instalments’—(contd.)

on default of payment of interest, the principal and interest should become payable on demand, the cause of action arises on the date of default.

(NOTE).—This case distinguishes 2 A. 322 and 8 B. 561.

(2) Mortgage or hypothecation bond:—

(a) By analogy the principle of this article is applicable to the case of a bond hypothecating immoveable property. 101 P.R. 1880.

(b) In the case of instalment bonds hypothecating immoveable property, where there is no waiver, limitation runs from the date of the first default. 24 C. 281; 4 P.R. 1894.

(c) A ——— for payment of principal and also providing for payment earlier, in case of non-payment of interest yearly, if the obligee so requires or demands, is not an instalment-bond within the meaning of the article. It only gives an option to the obligee to demand payment before the specified date, which option it is his privilege to exercise or not. 22 M. 20. (8 B. 561. 568; 20 M. 245).

(3) ‘Whole amount due only on demand:—

(a) Where, in the case of an instalment-bond, the intention of the parties, as gatherable from the instrument, is that the whole amount should become due in the event of a default in payment of any instalment only when a demand is made, the cause of action would arise only on demand. 8 B. 561.

(b) A suit brought more than three years after the last instalment became due, on a bond payable by instalments stipulating that in default of any one instalment, the whole amount should be recovered on demand, would be barred, even though no demand was made. 7 M.H.C. 293.

(N.B.)—This was a case under Act IX of 1871.

(4) Verbal contract to pay borrowed amount in instalments:—

This article does not apply, according to its strict terms, to a suit brought upon a verbal contract. Where a verbal agreement stipulates for payment by instalments and, in default of payment of certain instalments, that the whole amount should become payable, such contract gives only an option to sue at once on failure to pay the particular instalments, and limitation would run only from the date of the successive instalments. 3 C. 619=2 C.L.R. 167.

(5) When cause of action arises:—

(a) In the case of an instalment-bond, the cause of action arises on the first default, provided the bond provides that, in case of default, the whole amount should become due. 7 W.R. 21; 2 A. 857; 1 A.W.N. 17; 7 B.H.C. 125; 1 B. 125; 66 P.R. 1904=138 P.L.R. 1903; 31 C. 297 (following 21 C. 542 and dissenting from 13 C.L.R. 243).

(b) If, however, it is proved that the creditor waived the benefit of the provision, the cause of action would not arise on the first default, but it would arise as each instalment falls due. 20 B. 109; 11 B.H.C.A.C. 155; 5 B.H.C.A.C. 35; 4 B. 96; 66 P.R. 1904=138 P.L.R. 1903; 6 N.W.P.H.C. 88; 31 C. 297 (following 21 C. 542 and dissenting from 13 C.L.R. 243).

1.—‘Promissory note or bond payable by instalments.’—(concl'd.)

- (c) The above rules would hold good in cases of execution of instalment-decrees. 2 A. 443; 20 C. 74; 15 C. 502; 6 C.W.N. 948.
- (d) If there is no option left to the creditor or the decree-holder to waive, the cause of action for the suit or the starting point of limitation for execution would arise on the first default. 13 C. 78; 23 P.R. 1900.
- (e) Compare 1 C.W.N. 229, where it has been decided that the cause of action arises on the first default even where the bond gives an option to the creditor either to sue for the whole amount or for the particular instalment overdue.
- (f) These principles are applicable even in cases of hypothecation or mortgage bonds and, in such cases, limitation will run from the first default, unless there is waiver. 24 C. 281; 4 P.R. 1894; 101 P.R. 1880.
- (g) —See, further, No. 2, *supra*, at p. 806.

2.—‘Unless where the payee or obligee waives the benefit of the provision.’

(1) Waiver a good defence:—

Waiver will be a good defence for limitation in suits as well as in execution-applications in cases of instalment bonds or instalment decrees respectively. This was a case in which the decree-holder received the instalments notwithstanding default. 11 A. 482.

(2) Right of creditor to waive:—

- (a) Though a creditor can exercise the right to enforce the provision as to collect the whole amount due on default in any instalment, only once, he may waive the benefit of it, not only on the first, but on any subsequent, default. 3 M. 61.
- (b) The proviso in an instalment decree that, on default of payment of one instalment, the whole amount then due should become payable, being one in favor of the decree-holder, he may waive it. 14 C. 352.

(3) Court cannot compel waiver:—

The obligee may waive any default under this article, but the Courts cannot compel him to do so. 52 P.R. 1876.

(4) When there can be no waiver:—

- (a) There can be no waiver after the last instalment becomes overdue, for the obvious reason that there are no two obligations for the creditor to elect between. 9 M. 271.
- (b) Nor could there be any question of waiver where a bond provides for payment of principal in three years, interest annually, and for the recovery of the whole amount, if there should be default in payment of interest and if the creditor were to make a demand; for, in such a case, the whole amount could not become due, unless a demand were made by the creditor, and because such a case is governed by art. 80 and not by this article. 10 P.R. 1888; Cf. 7 M.H.C. 293.

(5) What does, and what does not, constitute waiver:—

- (a) The waiver contemplated by the article, must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver. 20 B. 109.
- (b) The payment and acceptance of overdue instalments, coupled with the conduct of the parties, will determine a waiver. 27 B. 1.

2.—‘ Unless where the payee or obligee waives the benefit of the provision. ’—(concluded.)

What does, and what does not, constitute waiver—(contd.)

(c) Waiver must be manifested by some overt act on the part of the creditor.

A suit for the overdue instalment alone, when the whole amount has become payable, is an overt Act. 18 M. 257 (261).

(d) The acceptance, by the obligee, of an amount on account, or in satisfaction, of an overdue instalment, and not as a mere payment in reduction of the whole debt, accompanied by other circumstances indicating an intention to waive, will constitute a waiver within the meaning of this article. 12 M. 192; 78 P.R. 1890 (*distinguishing* 188 P.R. 1883, which held that acceptance of amounts subsequent to default would not constitute waiver, if the amount paid and accepted did not correspond to that of any instalment.)

(e) Acceptance of overdue instalments, after default, may constitute waiver. Such acceptance would estop the creditor from claiming the whole amount in a lump or any larger sum agreed to be paid in case of default. 5 A. 289; 9 C. 857; 4 C.P.L.R. 21.

But see 2 A. 857, which decides that a mere acceptance of subsequent instalments does not constitute waiver.

(f) The subsequent acceptance, by the obligee, of an overdue instalment may operate as a waiver and suspend limitation; but the obligee's allowing the default to pass unnoticed does not constitute 'waiver.' 5 C. 97.

(g) The mere abstinence from suing or enforcing a condition or remaining inactive without bringing a suit for an overdue instalment, is no evidence of waiver. 5 M.L.J. 241; 7 M. 577 and 583; 21 C. 542; 15 C. 502; 31 C. 297 (*dissenting from* 18 C.L.R. 243.)

(h) The mere omission by a creditor to enforce a condition under an instrument is no evidence of waiver within the meaning of this article. 14 C. 397.

(i) If, once, time begins to run, acceptance of overdue instalments will not stop limitation. 7 C. 56 (60).

(j) Where, in a decree payable by instalments with a penal clause for default, the decree-holder accepts payments after the due date, not on account of the specific instalments in arrears, but on account of the whole decree, such acceptance does not prove a waiver. 17 B. 555.

(Old Law.)

(1) Waiver as affecting law of limitation :—

(a) Waiver could not affect the law of limitation before art. 75 was enacted in Act IX of 1871. 3 A. 514.

(b) Where a person covenanted that, if the first instalment of a decree was not paid on a given date, he would be responsible in his own person and property, for certain amount due, a suit based upon such covenant should be brought within three years from the date of the covenant, Act XIV of 1859, s. 1, cl. 10 being applicable to the case. 3 B.L.R.A. C. 16—11 W.R. 330.

NOTE :— The cases bearing on instalment-decrees and noted under art. 179 (*post*), which is the place appropriate for them, may, with advantage, be studied and compared with the cases noted under this article,

- 76.**—On a promissory note given *Three years.* The date of the delivery to the payee.
by the maker to a third person to be delivered to the payee after a certain event should happen.
- 77.**—On a dishonoured foreign *Three years.* When the notice is given.
bill, where protest has been made and notice given.
- 78.**—By the payee against the *Three years.* The date of the refusal to accept.⁽²⁾
drawer of a bill of exchange⁽¹⁾, which has been dishonoured by non-acceptance.

(Old Acts.)

[Art. 78 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—‘By the payee against the drawer, &c.’

Suit by payee against drawer or acceptor :—

A suit by the payee against the drawer or acceptor of a bill of exchange, which has been dishonoured by non-payment is governed by art. 80.

The fact of the payee's claim against the acceptor being barred by limitation, would not exonerate the drawer if the suit against him was instituted within the period of limitation. 26 M. 239, (See Mitra's Limitation, at p. 882, 4th Edition).

2.—‘The date of the refusal to accept.’

Hundi not presented for acceptance but only for payment :—

To a suit on a dishonored *hundi*, payable at a fixed time after date, but which had never been presented for acceptance but only for payment the article applicable is 80 and not this article nor art. 69.

- 79.**—By the acceptor of an ac- *Three years.* When the acceptor pays the amount of the bill.
commodation-bill against the drawer.

(Old Acts.)

[Art. 81 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

80.—Suit on a bill of exchange, *Three years*. When the bill, note or promissory note, or bond bond becomes payable⁽²⁾.
not herein expressly provided for⁽¹⁾.

(Old Acts.)

[Art. 80 of Act IX of 1877].—Suit on a bill of exchange or promissory note not herein expressly provided for—Three years—When the bill or note becomes payable.

Act XIV of 1859.—No corresponding provision.

(Notes)

1.—‘Promissory note or bond not herein expressly provided for.’

(1) Suit to recover money due on a pledge:—

A———by sale of the property pledged as also from the defendant personally is not governed by this article even though the pledge is accompanied by a memorandum in writing, such memorandum not being a promissory note or a bond but by art. 57 so far as the personal remedy is concerned and by art. 120 so far as the remedy by sale of the pledged property is concerned. 17 A. 284 (22 C. 21).

(2) Suit on unregistered bond pledging moveable:—

(a) A suit on an unregistered bond, whereby certain moveable property was pledged as security for the repayment of principal and interest, is governed by this article. If the claim for recovery of the debt is barred, that for enforcing the sale of the property pledged will also be barred, the latter claim being only an accessory to the former.

(b) But see 22 C. 21, which decides that the suit, so far as it concerns the recovery of the amount lent by sale of the property pledged, is governed by art. 120 and that such right might be enforced by suit, even though the claim to recover the amount from the person of the defendant might be barred.

(c) Compare 12 C. 389, which decides that, if the amount realized by sale of the property hypothecated proves insufficient to pay the whole debt due a second suit cannot be brought for recovery of the balance from the person of the debtor.

2) Bond fixing term, but giving option to creditor to demand:—

Where a bond fixes a term for payment but provides that in case of the obligor's default in paying interest regularly in the meantime, the creditor might, at once, enforce payment of the amount, and the creditor makes no demand, though there was default, limitation would run from the expiry of the term originally provided for payment. 10 P.R. 1883.

(3) Bond subject to conditions:—

(a) A suit on a———or penalties is governed by this article. 26 P.R. 1899 (following 138 P.R. 1890).

1.—‘Promissory note or bond not herein expressly provided for.’—(old.)

Bond subject to conditions:—(concluded).

(b) A bond providing for payment of a certain amount with interest at a specified rate at the harvest of a certain year and, in default, to pay interest at the specified rate up to the date of payment, is governed by this article, and not by art. 66 or 67. 138 P.R. 1890.

Compare 2 A. 322 (Note No. 4 at p. 799 supra).

(4) Pro-Note payable on demand after obligee's majority:—

This article is applicable to a suit on a promissory note payable on demand after the obligee attains majority, the cause of action arising from the date of demand after the obligee's attaining majority. 3 M.L.J. 199.

(5) Suit on surety bond:—

Where a security bond is executed in order that the execution of a decree may be stayed, a suit for the recovery of the amount due under the bond would be governed by this article, and limitation would run from the date when the surety is called upon by the Court to pay the money, as that is the time when the bond becomes payable. 1 C.W.N. cccxiii.

(6) Pro-Note payable after so many months on demand:—

Where a promissory note was payable "after six months, whenever the payee should demand the same," limitation began to run upon the expiration of six months from the date of the note. 7 Bom. H.C.O.C. 36.

Compare 14 W.R.O.C. 5 on the same point.

(7) Suit on a dishonored hundi:—

A ——— payable at a fixed time after date, but which had never been presented for acceptance but only for payment, is governed by this article. 19 P.R. 1888.

(8) Suit by payee against drawer or acceptor:—

See 26 M. 239, noted under art. 78, *supra*.

(9) Suit by pawnee for balance:—

This article is inapplicable to a suit by a pawnee to recover the balance of his debt after crediting the proceeds of the sale of the articles pledged. 24 A. 251.

2.—‘When the bill, note or bond becomes payable.’

(1) See 3 M.L.J. 199; 1 C.W.N. cccxiii; 7 B.H.C.O.C. 36; 19 P.R. 1888; noted under Nos. 4, 5, 6, 7, under Heading No. 1, *supra*.

81.—By a surety against the principal debtor. **Three years.** When the surety pays the creditor.⁽²⁾

(Old Acts).

[Art. 82 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Construction of article :—

This article should be construed as restricted to sureties, who have paid the creditor, and not as extending to sureties, who have not paid the creditor, but have been compelled to pay contribution to a co-surety who has paid the creditor. 98 P.R. 1881.

1.—‘ By a surety against the principal debtor.’**Suit by lessee's surety against lessee :**

The article is applicable to a suit by a surety of a lessee to recover money paid on lessee's behalf, the cause of action arising from the date the surety paid to the lessor on default of the lessee. W.R. (1864), 57.

2.—‘ When the surety pays the creditor.’**(1) Suit for contribution :—**

In a ————against a co-judgment-debtor, whether art. 61 or 81 is applied, the cause of action arises from the date of payment by the plaintiff in excess of his share. 11 A.W.N. 102.

(2) Commencement of time :—

As to when time begins to run, see W.R. (1864), p. 57.

82.—By a surety against a co- **Three years.** When the surety pays⁽¹⁾ anything in excess of his own share.

(Old Acts.)

[Art. 83 of Act IX of 1871.—Same as above, except that, for the word ‘ surety ’ in the present article, there was the word ‘ plaintiff ’ in the 3rd Column.

Act XIV of 1859. —No corresponding provision.]

(Notes)**1.—‘ When the surety pays.’****(1) Suit by a surety against a co-surety:—**

For a ————for contribution, both having guaranteed the amount of a bill, which is since dishonored, and the former having paid the amount on the dishonored bill, the cause of action arises, not when the bill is dishonored, but when the surety pays the amount thereof. 1 N.W.P.H. C. 100.

(2) Involuntary payment :—

The article would apply whether the payment was made by the plaintiff voluntarily or whether it was enforced by judicial or revenue process. Compare 26 M. 686 (F.B.)

83.—Upon any other contract to **Three years.** When the plaintiff is indemnify⁽¹⁾. **actually damnified.**

(Old Acts.)

[Art. 84 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—‘Any other contract to indemnify.’

(1) Remedy against debtor barred—Surety discharged :—

(a) If the remedy against the principal debtor be allowed to be barred by limitation, the surety will be discharged. 24 A. 504 ; 8 A. 259 ; 11 A. 310.

(b) So, also, if a bond creates a personal obligation on the part of a debtor to pay money, and if the remedy against the principal debtor is allowed to be barred, the suit as against a surety, who has undertaken to indemnify the creditor in respect of the personal default of the debtor, will be discharged. 9 A. 205.

Compare 5 B. 647, noted below.

(c) Where a suit brought against a principal debtor and his surety was in time, but it appearing later on that the principal debtor had been dead at the institution thereof, his heirs were brought on record after the period of limitation, the surety was *held* not to have been discharged. 12 C. 330.

Compare 4 C.L.R. 34, on the same point.

(2) Non-agriculturist debtor—Agriculturist surety :—

Though a suit may be barred by limitation as against a non-agriculturist principal debtor, it will not be barred as against a surety, who is an agriculturist. 5 B. 647.

(3) Suit by surety against principal debtor :—

A ——— is governed by this article, and time will run from the date on which the surety is actually damaged. 2 U.B.R. (1892—1896), 308.

(4) Suit by purchaser against vendor :—

Where the purchaser of a property lost a portion of it in consequence of the vendor having no title thereto, a suit by him for damages against the vendor was *held* governed by art. 97, and not by this article. 26 B. 750.

(5) Suit for contribution :—

Where a covenant in an *ekramnama* created a liability in the defendants to pay certain debt and, in consequence of their default, property belonging to the plaintiff was sold in execution of a decree, the cause of action for a suit for contribution by the plaintiff would accrue only when the plaintiff was damaged, and limitation would run only from that date. 26 C. 241.

(6) Suit on an implied contract :—

If one man requests another to pay money for him, there is an implied contract on the part of the former to repay the amount to the latter. A suit, therefore, by the latter will be governed by this article, as regards limitation. 7 W.R. 386.

Notes—(concluded).**1.—‘Any other contract to indemnify.’—(concluded).****(7) Suit by one surety against a co-surety:—**

A ———, both being bound to the creditor by the same instrument, will be one for contribution on an implied contract. To such a suit, this article may apply. 4 B. 321.

But see 7 W.R. 377, where it has been *held* that there is no implied contract for contribution on the part of sureties, any more than there is on the part of persons who are liable by law to contribute to general average.

(8) Suit by co-surety against principal debtor:—

This article would apply to the case of a surety seeking to recover from the principal debtor a sum paid by the former to a co-surety as contribution towards the amount paid by him to the creditor. 98 P.R. 1881.

(9) Claim of set off:—

Where a suit is brought for recovery of price of goods supplied. (the contract for supply of goods being evidenced by a deed containing a clause for indemnifying the defendants in case of default in supplying goods at the time fixed) and the defendant claims damages, for irregular supply of goods, by way of set-off, limitation in respect of the set off will run up to the date of the suit by the plaintiff, and not up to the date on which the set-off is claimed by the defendant. 7 A. 284 (287) = 5 A.W.N. 40.

(10) Suit by assignor of lease against assignee:—

Where the assignor of a lease, which contained a covenant to repair, had to pay damages for breach of the covenant by his assignee, a suit by him to recover from the assignee the amount paid by him would be governed by this article, and limitation would be calculated from the date of his being damnified. 5 C. 811 = 6 C.L.R. 167.

(11) Suit against acceptor barred, but against drawer in time:—

If the acceptor of a bill of exchange be made a party to a suit against the drawer thereof after the period of limitation had expired, he will not be held liable, but that fact would not relieve the drawer of his liability if the suit against him had been instituted in time. 26 M. 239.

The words “any other contract” seem to cover cases of implied or *quasi* contracts, such as those falling under Ss. 69 and 70 of the Indian Contract (Act IX of 1872).—See 7 W.R. 377 (F.B.); 5 M. H. C. 200; 4 B. 321; 3 A. 66; and 15 C. 652 (F.B.), noted under this article in *Mitra’s* Limitation (4th Edition) at p. 885. Suits for contribution are of this class.

But it was doubted in 8 C. 113, whether a suit for contribution, where both plaintiff and defendant were liable for the money paid by the plaintiff, falls within the scope of either art. 69 or 70 of the Contract Act, which seems rather to contemplate persons who, not being themselves bound to pay the money or to do the act, do it under circumstances giving them a right to recover from the person who has allowed the payment to be made and has benefited by it.

(12) Suit by a co-surety against principal debtor:—

A ——— to recover a sum paid by the plaintiff to a co-surety as contribution towards the amount paid by him to the creditor. 98 P.R. 1881.

- 84.**—By an attorney or vakil for *Three years*. The date of the termination of the suit or business⁽³⁾, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance.
- his costs of a suit or a particular business,⁽¹⁾ there being no express agreement⁽²⁾ as to the time when such costs are to be paid.

(Old Acts.)

[Art. 85 of Act IX of 1871.—Same as above, except that the words “the date of the” before the word “termination, &c.” in the last column of the present article are new.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

Suit by vakil against client's agent :—

A suit by a vakil against his client's agent, for the recovery of money paid by him to be delivered to his clients but not delivered, would be governed by art. 120, the cause of action arising from the date, the plaintiff is compelled to pay money which the defendant was legally bound to pay. 2 M.H.C. 21.

1.—‘ Suit or particular business.’

(1) Application under Rule 149, Common Law Rules :—

An application under Rule 149 of the Common Law Rules of the late Supreme Court of Bombay, by an attorney in respect of his bill of costs, was not a suit; such an application was not barred by any law of limitation. 1 B. 253.

(2) Suit or particular business :—

Subsequent proceedings taken in connection with the taxation of an opponent's costs are not part of the suit or application. 22 C. 943.

2.—‘ There being no express agreement, &c.’

No time fixed for payment of fees :—

- (a) Where a *vakalatnamah*, under which a pleader was engaged contained an agreement on the part of the client to pay the fee, prescribed by law, but fixed no time for the payment of the fee, it was held that a suit for fees brought more than three years from the date of the *vakalatnamah* was barred. 9 W.R. 119.

(NOTE).—This was a case under Act XIV of 1859.

Compare 5 W.R. 297 and 5 W.R. S.C. Ref. 1, which decide that, in the absence of an agreement to pay the fee on a fixed date, the cause of action for fees arises on the date of the termination of the suit or proceedings.

- (b) In a suit by a vakil for fees, the starting point for limitation begins from the date of the termination of the suit he conducted, if there had been no special agreement as to when the vakil was to be paid. 6 M.H.C. 265.

3.—'The date of the termination of the suit or business.'

(1) When a suit terminates :—

- (a) A suit is said to terminate when judgment is given in the Court in which the action is commenced. 7 B. 518.
- (b) A suit can ordinarily be said to terminate when there is nothing more to be done in it except execution. The fact that the attorney may have to appear in execution-proceedings cannot postpone his right of suit. 22 C. 952 (Note).
- (c) A suit does not terminate, within the meaning of this article, until the costs are taxed and inserted in the decree and the decree is issued. 7 M. 1.

(2) Termination of application :—

In a suit by an attorney against his client to recover the cost of an application to the High Court, the date of the Judgment in the application was held to be the termination of the application. 22 C. 948.

(3) Compromise of execution-proceedings :—

A Compromise between the decree-holder and the judgment-debtor without the knowledge of the Solicitor retained to execute the decree and without certifying the same to the Court, is not a termination of the business, for which the Solicitor was retained, within this article. 1 B. 505.

General.

In the absence of a written agreement fixing the amount of fees to be paid to a pleader, the latter will be entitled to *quantum meruit* as for work and labour done,—see s. 28 of the Legal Practitioners' Act (XVIII of 1879) and the notes thereunder at p. 493 *supra* (Lawyer's Companion). The cases bearing on this point are :— 2 M.L.J. 247 = 16 M. 278 : 160 P. R. 1888 ; 20 M. 365 ; 17 M. 306 : 136 P.R. 1893 ; 9 M. 375 ; 12 A. 269 ; 14 M. 63, 12 B. 557 ; 9 B.H.C. 33.

85.—For the balance due on a *Three years*. The close of the year⁽²⁾ mutual, open and current in which the last account, where there have item⁽³⁾ admitted or been reciprocal demands proved is entered in between the parties⁽¹⁾. the account; such year to be computed as in the account.

(Old Acts)

[Art. 87 of Act IX of 1871.—Columns 1 and 2. same as above. Column 3—'The time of the last item admitted or proved in the accounts.'

Act XIV of 1859.—In suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts.]

(Notes)

1.—'Mutual, open and current accounts.'

(1) Intention of the article :—

- (a) The ——— appears to be that it should be applicable to those cases where the course of business is such as to give rise to reciprocal demands between the parties, (i.e.) such that sometimes the balance may be in favor of one party and sometimes in favor of the other. 6 B. 134 (138).
- (b) The article is intended to apply to cases where an account has been going on between two parties and balances have been struck, from time to time, showing the amount due from one of such parties to the other; and the suit to which the article is intended to apply is one brought by one of those parties against the other, for the balance found due to him on that account. 6 C. 447 (450).
- (c) In order to bring a case within this article, there must be a mutual open and current account between the parties, in which there were reciprocal demands. 5 C. 759 = 6 C.L.R. 112.

(2) Mutual accounts, what are :—

- (a) To constitute mutual accounts, there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. An account consisting of entries of payments made by one party in reduction of his debt to the other, and of payments made by the latter on behalf of the former party for the same purpose, is not a mutual account. 17 M. 293 = 4 M.L.J. 140; 6 M.H.C. 142.
- (b) Mutual accounts are confined to accounts between two parties which show reciprocity of dealings, or, in other words, to transactions in which there is a mutual credit founded on a subsisting debt or an express or implied agreement for a set-off of mutual debts. W.R. (1864), 235.

(3) Test of mutuality :—

- (a) The fact that, in the accounts, the balance shifts sometimes in favor of plaintiff and sometimes in that of defendant, is a valuable index as to the nature of the dealings, but it is not a decisive test. To be mutual, the dealings must partake of the nature of transactions creating on each side independent obligations; and not merely obligations on one side, those on the other side being merely discharges of these obligations. 22 B. 606.
- (b) Though a shifting balance is a test of mutuality, its absence is not conclusive proof against mutuality. 17 M. 293 = 4 M.L.J. 140.

(4) Necessity of cross-demands :—

For the article to be applicable, there must be cross-demands, the striking of the balance between which constitutes a new consideration for the promise on the part of the person against whom the balance is found, to pay the balance so settled. 9 Bom : H.C.O.C. 429.

1.—'Mutual, open and current accounts.'—(continued.)**(5) Balance always in favor of plaintiff:—**

A suit to recover the balance of money lent at intervals by the plaintiff to the defendant, the account-book showing a balance always in favour of the plaintiff, is governed by art. 57, and not by this article. 12 A.W. N. 215; 13 A.W.N. 84.

(6) Balance sometimes in favor of plaintiff and sometimes in favor of defendant:—

This article would apply when the nature of the transactions between the plaintiff and defendant is such, that sometimes the balance is in favor of plaintiff and sometimes in favor of defendant, and where the transactions give rise to reciprocal demands between the parties. 3 A. 523 and 16 A.W.N. 186; 6 B. 184.

(7) Suit in absence of reciprocal demands:—

Where no mutual account or reciprocal demands exist, a person cannot recover any items due more than three years prior to the date of suit, but he would be entitled to apply all payments—even those subsequently made in reduction of so much of his claim as was barred. 24 W.R. 390; 8 Bom. H.C.A.C. 6.

(7-a) Banking transaction:—

The article is applicable to a suit for balance of account in the case of a banking transaction, where the balance was sometimes on one side and sometimes on the other, the change not appearing to arise from a merely accidental and passing over-payment. 44 P.R. 1886.

(8) Accounts between principal and agent:—

(a) In a suit by a principal against his agent for balance due on an account, it was found that the agent alone kept a written debit and credit account. *Held* that the account showed reciprocal demands between them, and that it was a mutual, open and current account within the meaning of this article. 10 M. 199.

(b) Where the account was one continuous transaction between principal and agent, with debits and credits on each side of it, and the contract was to pay the balance of that account when it should be struck, a suit for the recovery of the balance due under the accounts is governed by this article. 1 I.A. 346 (P.C.).

(c) A suit by a principal against his commission agent who was to sell goods on commission was held not governed by this article. 7 W.R. 67.

(d) S. 8 of Act XIV of 1859 (corresponding to the present article, was held inapplicable to a suit by a commission-agent against his principal as such. 24 W.R. 440.

(9) A debit and credit account, furnished by a commission agent, was disputed by the principals, and for the purpose of referring the matter to an arbitration, a "memorandum of items to be settled" was drawn up and signed by the principals, wherein they denied that any balance was due to the agent, but admitted that accounts must be taken and their liability to pay if any balance were found due to the agent. One of the principals signed and supplied to the arbitrator an account on behalf of himself and the other, containing a similar admission. *Held* that the accounts were mutual, open and current accounts, 10 M. 259.

I.—‘Mutual, open and current accounts.’—(concluded.)

(9-a) Lessor and lessee :—

Where the relationship between the plaintiff and the defendant is that of a lessor and lessee, the mere fact of some amounts having been paid by the deft : (lessee), on account of the plaintiff, for Government revenue, litigation expenses &c., would not alter the original relationship into one of principal and agent, so as to entitle the lessor to sue for an account. 27 C. 663.

(10) Debtor and creditor :—

The article was held inapplicable to a suit for balance of account, where the account was an ordinary debtor and creditor account, in which the defendant never made any demand against the plaintiff, to whom he was indebted. 58 P.R. 1882.

(11) Servant and master :—

A suit by an employe, who has left the service of his master, for the wages due to him, must, in the absence of any subsequent account stated and settled between the parties, be brought within three years from the date on which he left the service. 18 W.R. 466; 19 W.R. 159.

(12) Partnership debts and separate debts :—

Where, on the dissolution of a firm, the debt due by the firm to the plaintiff was carried into the separate account of the defendant, who was a member of the firm without his consent, a suit to recover that amount is not governed by this article as there has been no mutual, open and current account between the parties. 1 C.L.R. 525.

(13) Repayments of debts :—

Mere ————borrowed by defendant from plaintiff cannot make the dealings between the parties mutual dealings, or the accounts mutual, open and current accounts. 10 W.R. 56.

(14) Cause of action based on settlement of accounts :—

If the cause of action for a suit is based on a settlement of accounts or statement of accounts, this article would not apply. 6 W.R. 328: Cf. 4 W.R.S.C. Ref. 1; 3 W.R.S.C. Ref. 18.

NOTE.—These were cases under Act XIV of 1859.

(15) Suit by firm against agent :—

In a suit by a firm against a *del credere* agent, it was found that the last item in the account between the principals and the agent in their dealings, accrued more than three years before the suit. Held that, as the action was for breach of contract, S. 8 of Act XIV of 1859 (corresponding to this article), was inapplicable. 14 M.I.A. 134 (P.C.)=16 W. R. 85 (P.C.)=10 B.L.R. 15.

2.—'The close of the year.'

(1) **Sumbut year:—**

A mutual, open and current account kept according to the *Sumbut* year, was adjusted in a certain month before the close of the year. *Held* that, even assuming that, on the date of adjustment, the account ceased to be mutual, open and current, a suit for the balance due upon such adjustment, instituted more than three years from the date of adjustment, but less than three years from the close of the year, is governed by this article and is within time, the cause of action arising from the close of the year. 5 C.L.R. 211.

(2) **Commencement of time: -**

(a) The period of three years was intended to be reckoned from the time when the balance was struck, and the Legislature contemplated that such balance would be struck annually. 14 W.R.O.C. 41.

(b) Where a suit is brought on a balance of accounts on mutual dealings, the limitation would be reckoned from the time when the balance of accounts is struck. 5 B.L.R. 550=14 W.R.O.C. 41.

(NOTE).—This was a case under Act XIV of 1859.

(3) **Court's finding as to balance: -**

Where, in a suit, the Court incidentally found that, on mutual accounts, certain amount was due to the defendant from the plaintiff, such finding cannot be said to be any adjustment of balance, so as to enable the defendant to date his cause of action from such adjustment in a suit by him to recover the amount found due. 14 W.R. 184.

3. - 'The last item.'

The word "item" in the article means the last admitted item on the defendant's side of the account or, in other words, the last reciprocal item. 5 C. 759=6 C.L.R. 112.

86—On a policy of insurance, *Three years.* When proof of the death or loss is given or received, to or by the insurers, whether by or from the plaintiff, or any other person.

(Old Acts.)

Art. 88 of Act IX of 1871 - Same as above, except that the word 'immediately' before the words 'after proof of death' in column 1 of the present article is new.

Act XIV of 1859.—No corresponding provision.]

- 87.**—By the assured to recover *Three years*. When the insurers elect to avoid the policy voidable at the election of the insurers.

(Old Acts.)

[Art. 89 of Act IX of 1871.—Same as above.

Act XIV of 1859.—*No corresponding provision.*]

- 88.**—Against a factor for an ac- *Three years*. When the account is, during the continuance of the agency, demanded and refused⁽¹⁾, or where no such demand is made, when the agency terminates⁽²⁾.

(Old Acts.)

[Art. 64 of Act IX of 1871.—Columns 1 and 2—Same as above. Column 3.—

When the account is demanded, or where no such demand is made, when the agency terminates.

Act XIV of 1859.—*No corresponding provision.*]

(Notes)

1.—'When the account is demanded and refused.'

Necessity for demand :—

If demand for an account is not made, no cause of action accrues against the agent until the agency is determined. 26 C. 715 (725).

2 —When the agency terminates.'

(1) When the agent ceases to do duty :—

As against the agent, limitation begins to run from the date on which he ceases to discharge his duties as such. 14 C. 147 (154). (P.C.).

(2) Suit against agent's representatives :—

(a) Where a *Gomastah* died, having overdrawn a sum of money from the funds of certain *guddees* under his charge³, in a suit against the representative of the gomasta to recover the sum overdrawn, limitation would be computed from the date of his death, and not when he over-drew the same. 2 B.L.R. A.C. 139=11 W.R. 76.

(b) On the death of a Manager a right to an account accrues to the employer as against the Manager's representatives, but limitation will not begin to run until administration has been taken out to such manager's estate. 7 C. 627 (632).

(3) Proof of termination of agency :—

The termination of agency may be inferred from the facts proved. 6 C.L.R. 101.

- 89.**—By a principal against his agent⁽¹⁾ for moveable property⁽²⁾ received by the latter, and not accounted for⁽³⁾. *Three years.* When the account is, during the continuance of the agency⁽⁴⁾, demanded and refused⁽⁵⁾, or where no such demand is made, when the agency terminates⁽⁶⁾.

(Old Acts.)

[Art. 90 of Act IX of 1871.—Columns 1 and 2.—Same as above, Column 3.—

When the account is demanded and refused

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Suit for equitable claim :—

A suit relating to an equitable claim against a trustee liable to account is not governed by this article, which is applicable only where a relationship of principal and agent subsists between the plaintiff and the defendant. 7 A. 25 (28)—4 A.W.N. (219), *refera.* to 10 C. 860. (P.G.).

(2) Ward & Guardian :—

Art. 120, and not art. 89, is applicable to a suit by a ward, who has attained majority, for an account against his ex-guardian. 84 P.R. 1891.

(3) Suit for account and for money found due :—

This article is applicable to a suit by a principal against an agent for an account and for money that may be found due upon such account being taken. 8 C.W.N. 118.

(4) Suit against deceased agent's representative :—

(a) In a suit against the representatives of an agent to collect rents, for sums received and misappropriated by the agent, the contract of agency being in a duly registered instrument, art. 116 is applicable to the sums received under the registered instrument, and the limitation of three years is applicable in respect of other sums not coming within the scope of the instrument. 12 C. 357.

(b) The article is inapplicable to a suit by a principal against the representative of a deceased agent for an account of the amount recoverable by him, as it is not one against an agent for an account, nor against the defendant upon a cause of action which arose against the agent, for an account.

The terms of the article are inapplicable to a case where the agency is determined by death. 96 P.R. 1886.

(5) Suit against pleader's representative :—

A——for money received by a deceased pleader, but not accounted for, is governed by art. 120 and not by this article, since this article contemplates only suits against the agent himself and not against his representative. 25 A. 55.

Scope of article—(concluded.)

(6) **Suit against receiver:—**

The article is inapplicable to a suit to recover money in the hands of a Receiver appointed in execution of a decree. Such a suit is governed by art. 130. 3 O.C. 171.

(7) **Denial of relationship:—**

(a) Where the relationship of principal and agent is denied, limitation begins to run as against the principal from the date of the denial of the agency. 16 M. 456.

(b) Where the original relationship of principal and agent is established, the mere denial, on the part of the agent, of such relationship will not affect the question of limitation. 4 M.L.J. 23; 21 M. at p. 159; 27 B. at p. 53; and Mitra on Limitation at p. 893.

(8) **Suit by an agent against principal:—**

An agent cannot sue his principal for adjustment of accounts, and the mere fact that the principal keeps the accounts would not give the agent any right to claim an account from the principal. 1 P.L.R. 27.

I.—‘Agent.’

(1) **Suit against agent:—**

(a) A suit for an account, brought by a principal against his agent, is governed by art. 89 and limitation runs from the date of the termination of the agency. 1 C.L.J. 147.

(b) But where the liability of an agent is based on a registered agreement, a suit for an account by the principal against the agent is not governed by art. 89 but by art. 116 and limitation begins to run from the date on which the contract to render accounts is broken. 1 C.L.J. 211.

(2) **Co-sharer and Lambardar:—**

Art. 120, and not this article, is applicable to suits by a co-sharer-proprietor of a village against a lambardar-co-sharer, for his share of the profits, as the lambardar is not an agent as is contemplated by art. 89. 10 C.P. L.R. 98.

(3) **Partner and Manager:—**

This article is applicable to a suit by one of the partners of a firm against the manager, who is entitled to a certain share of the profits instead of salary, for (1) money borrowed from the firm by the manager for his personal expenses and (2) the Manager's share of the losses; it being substantially a suit by a principal against his agent for moveable property received by the latter and not accounted for, the cause of action accruing from the termination of the agency. 31 P.R. 1801.

(4) **Municipal Council and Chairman:—**

There is no relationship of principal and agent between a Municipal Council and its Chairman. A suit, therefore, by the Council against its late Chairman, for money embezzled by the latter during his tenure of office, is not governed by this article. 22 M. 342.

I.—‘Agent.’—(concluded).

(5) Manager of joint family :—

- (a) The manager of joint-family property is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. 7 C.W.N. 754 (P.C.) ; 5 B.L.R. 347 (F.B).
- (b) The manager of a joint Hindu family is an agent liable only to account as to the then existing state of property, and not, as in the case of a regular agent, to account for the income of past years and expenditure. 22 M. 470 (P.C.).

(6) Zemindar and Gumastah—Fraud :—

Where, in a suit by a Zemindar against a gumastah, fraud is not alleged, the Court cannot assume it merely on the ground that the accounts were not filed till the close of the year of the determination of the agency. 22 W.R. 898.

(7) Suit against heirs of gumastah :—

In a——— for sums overdrawn by the gumastah, less the amount of salary due to him during the period of his incumbency, the suit would, unless there were a special agreement for setting off the salary against the sums overdrawn, be barred as to items overdrawn more than six years before suit. 9 W.R. 894.

2.—‘Moveable property.’

(1) Moveable property :—

- (a) ——— includes money. 24 A. 27 (P.C.) = 1 C.L.J. 232.
- (b) A suit by the sons of a deceased person against his widow, for the recovery of moveable property of the deceased, in her possession, would be governed by this article. 5 C. 692 = 5 C.L.R. 505.

3.—‘And not accounted for.’

First suit for collection—papers—Second suit for money :—

A second suit against an agent for recovery of money, found due on collection—papers, for recovery whereof the first suit was brought, will be barred by the combined operation of S. 30 of Bengal Act VIII of 1869 and this article, if the same is brought more than three years from the date of the agent's discharge from service. 3 C.L.R. 444.

4.—‘During the continuance of the agency.’

(1) Agency for sale of goods :—

An——— does not terminate until the price received by the agent is paid to the principal or is duly accounted for. Limitation does not begin to run as soon as any portion of the goods is sold. If, therefore, a suit is brought within three years from the date of demand made during the time the price remains unpaid by the agent to the principal, it will be in time. 12 A. 541 = 10 A.W.N. 99 ; 26 C. 715 = 3 C.W.N. 524.

(2) See 20 C. 425 under Heading No. 6, *infra*.

(2) Advance of money to agent—Cause of action :—

No cause of action accrues when the principal advances money to the agent. The cause of action is dependent on the obligation to render accounts. 11 W.R. 76 = 2 B.L.R. 189.

5.—‘Demanded and refused.’**(1) Promise to render accounts on a future date:—**

Where, on the demand of a principal, the agent promises to render accounts on a future date, in a suit to compel an adjustment of accounts, limitation runs from the date on which he promised to render the accounts. 3 C.L.R. 446.

6.—‘When the agency terminates.’**(1) Computation of time:—**

Time must be counted from the date on which the defendant ceases to discharge his duties of agent by departing from the principal's service. 14 C. 147 (154)—13 I.A. 123 (P.C.).

(2) Suit against agent for collection of rents:—

A ——— for an account and for money fraudulently misappropriated, instituted within three years from the termination of the agency and within one year from the date of discovery of fraud, will be in time by the combined operation of this article and S. 33 of Bengal Act X of 1859. 20 C. 425.

(3) Suit for money received on joint account:—

A suit by one of two brothers against the other (each being the agent of the other) for an account of money received by the latter on the joint account is one governed by this article, and can be brought within three years of the termination of the agency. 24 A. 27 (P.C.).

(4) Suit against deceased agent's representative:—

In a suit for an account against the representative of a deceased agent, limitation will not run until administration has been taken out to the agent's estate. 7 C. 627.

(5) Denial of agency, effect of:—

When once the plaintiff establishes the original relationship of principal and agent, the mere denial, by the defendant, of the agency will not affect the question of limitation. 4 M.L.J. 23; 21 M. 159 and 27 B. 59—quoted in Mitra's Limitation at p. 893.

Suits under Bengal Acts X of 1859 and VIII of 1869.**(1) Commencement of time:—**

The fact of an agent furnishing his principal with an account under his signature with a letter upon which a balance appeared due, is a cause of action, irrespective of S. 33 of Act X of 1859. 22 W.R. 338.

(2) S. 30, Act VIII (B.C.), 1869:—

(a) A suit under ——— against a gumastah to obtain accounts, after the agency has determined, must be brought within a year from such determination, unless fraud be proved, in which case limitation runs from the discovery of the fraud. 16 W.R. 149.

(b) In a suit to contest an account under Act VIII (B.C.), 1869, the only ground on which the plaintiff can claim extension of limitation, is fraud, in which case limitation would run from the discovery thereof, 20 W.R. 386.

Suits under Bengal Acts X of 1859 and VIII of 1869—concluded.

(c) To a suit against an agent with regard to Zemindari matters for the recovery of money or the delivery of accounts and papers, there is no limitation other than that prescribed by Act VIII of 1869 (Bengal). S. 30. 21 W. R. 240.

(d) A suit against an agent for the recovery of money under Act VIII of 1869 (B.C.). S. 30, though brought within three years from the termination of the agency, was held barred, because not brought within a reasonable time after discovery of the fraud imputed to the agent. 21 W.R. 107.

(3) Suit by Zemindar against land-agent:—

(a) A—for sums unaccounted for, on the taking of accounts, instituted more than three years from the termination of the agency will be barred by limitation by S. 30 of Bengal Act VIII of 1869. 7 C. 80 = 8 C.L.R. 285.

(b) A suit for an account, merely, against an agent to collect rent will be barred if brought more than three years from the date of the agent's resignation or leaving the service of the principal. 5 C. 303.*

(4) Suits against Land agents:—

(a) A suit against an agent employed in the management of land or collection of rents &c., was (except in cases of fraud governed by S. 30 of the Act VIII of 1869 (B.C.) or S. 24 of Act X of 1859—4 C. 547. See Mitra's Limitation, p. 894.

(b) But the above sections will have no application where there is a special agreement between the landlord and the agent in regard to the rendering of accounts or payment of moneys. 9 C. 211 = 12 C.L.R. 329.

(5) Balance struck and agreed upon:—

Where, on an account being rendered by an agent after the termination of his agency, a balance is struck and agreed upon as due by him to the principal, such balance may constitute a cause of action against the agent. 20 W.R. 309.

(6) Fraud:—

If fraud be proved in a suit by a principal against an agent to recover money received by the latter during his agency and not accounted for, limitation would run from the time of knowledge or means of knowledge of the fraud. 4 W.R.S.C.C.R. 19.

90.—Other suits by principals *Three years*. When the neglect or against agents⁽¹⁾ for neglect misconduct becomes or misconduct. known to the plaintiff.

(Old Acts.)

[Art. 91 of Act IX of 1871.—Columns 1 and 2—Same as above. Column 3—

When the neglect or misconduct occurs.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—'Other suits by principals against agents.'

Suit for declaration as *uralan* :—

A suit by a person for a declaration of his right as *uralan* against another whom he alleged to be the agent of a *deवासम*, where the defendant denied the agency, was held governed by art. 120. 16 M. 466.

Suit against Municipal Chairman :—

A suit by a Municipal Council against its late Chairman for recovery of money embezzled by the Manager, during the tenure of his office as Chairman, is governed not by arts. 89 or 90, but by art. 96. 22 M. 342.

91.—To cancel or set aside⁽¹⁾ an **Three years.** When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him⁽³⁾.

(Old Acts.)

Art. 92 of Act IX of 1871.—Columns 1 and 2, same as above. Column 3
When the instrument is executed.

Act XIV of 1859.—No corresponding provision.

(Notes)

1.—'To cancel or set aside.'

NOTE (1).—This article is inapplicable to cases where (1) the substantial relief claimed is not cancellation of an instrument, but possession of property or any other substantial relief, the cancellation of an instrument being only an auxiliary or incidental relief. (2) or where the deed sought to be set aside is invalid or void, or (3) where the deed could not, if left outstanding, affect the interests of the plaintiff, or (4) where the deed was not, in its inception, intended to be operative, or (5) where the deed sought to be set aside was *benamoo* or *sham*; the reason being that, in such cases, the deed would not affect the interests of the plaintiff, if left outstanding; there will thus be no necessity on the part of the plaintiff to get it cancelled. He may treat the deed as non-existent and seek the substantial relief he may be entitled to, without a cancellation of the deed. To such cases, therefore, the article would not be applicable even though cancellation of a deed may be involved or may be the result, direct or indirect, of the grant of the substantial relief claimed.

1.—Examples of Inapplicability of article.

A.—Substantial relief, recovery of property, &c.

(1) Cancellation not essential part of relief:—

Unless a prayer for cancellation of an instrument is an essential part of the plaintiff's relief, the suit for recovery of property, though brought beyond the period prescribed by this article, would not be barred by this article. 14 M. 26.

(2) Substantial relief, possession of property:—

The article is inapplicable to cases where the substantial relief claimed is not a declaratory decree but simple possession of property and where the instrument is executed wholly without authority. 3 O.C. 105.

(3) Suit by heir to recover property from deceased's vendee:—

A suit by a deceased individual's heir to recover property and to set aside a sale alleged to have been executed by the deceased in favour of defendant, would be governed by art. 144 and not by this article. 2 C.L.R. 10.

(4) Substantial relief, recovery of land:—

(a) This article is not applicable to suits in which the substantial relief claimed is recovery of land. Where an instrument has been taken from plaintiff, in such a case, by means of fraud, a reference to such an instrument would be necessary only by way of confession and avoidance, and not as part of the relief claimed. The suit would not be barred unless plaintiff's title to the land had been extinguished by more than twelve years' adverse possession with the defendant. 16 M. 311 (315) = 3 M.L.J. 144.

(b) A suit by the purchasers at a sale in execution of a decree to set aside an instrument of usufructuary mortgage of the land purchased by them, executed by the judgment-debtor before the sale, on the ground that it was fraudulent and collusive, and for possession of the land, is governed by the twelve years' limitation. 6 A. 75 = 3 A.W.N. 212; 6 A. 260 = 4 A.W.N. 73.

Similarly, where the judgment-debtor has executed a lease: 4 A.W.N. 88;—the reason being that the substantial relief is possession, the prayer for cancellation of the deed being merely incidental.

(c) A suit was brought to recover possession of certain immoveable property "by avoidance of a spurious deed of gift." *Per* Straight, J.:—The suit was governed by art. 144 and not by art. 91. *Per* Stuart, C.J.:—The suit was governed by art. 91, and not by art. 144. 5 A. 76 = 2 A.W.N. 180.

(5) Substantial prayer, declaration of title:—

(a) Where a mortgagor granted a perpetual lease of the mortgaged property in contravention of a covenant in the mortgage-deed, a suit by the auction-purchaser of the property, in execution of a decree on the mortgage, for cancellation of the lease and for a declaration that the lessee had no right to interfere with, or obstruct, him in respect of the property, is governed by art. 120 and not by art. 91 or 95, the substantial prayer being merely the declaration of title, and the prayer for cancellation of the lease being only a subsidiary relief. 22 A. 90.

Examples of inapplicability of article—(continued).**A.—SUBSTANTIAL RELIEF, RECOVERY OF PROPERTY, &c.—(concluded).**

(b) In a suit for a declaration that the members of a *Nambudri Illom* to which the plaintiffs belonged, were the sole heirs and successors of another *Illom* and for the possession of certain land, the property of that *Illom*, it was found that plaintiffs' *Karnavan* had been adopted into that *Illom* and both the *Illoms* had been amalgamated by a *Karar* executed by the wife of the last male member of that *Illom* and that she had died less than twelve years before the suit. *Held*, the suit was not governed by this article nor by art. 120, and was not barred by limitation. 15 M. 6.

(6) Validity of deed incidental question :—

Where the primary object of a suit is recovery of property, the validity or invalidity of a deed forming only one of the questions involved in that claim, this article would not apply, but the longer period provided by art. 144 would be applicable. 5 C. 363—5 C.L.R. 374.

(7) Declaratory suit :—

Where, in a suit for confirmation of possession after setting aside a deed of sale, the Court found that the plaintiff had no possession, the suit was still regarded as one for a substantial relief and not merely for a declaratory decree. 21 W.R. 340 (P.G.)

(8) Suit for declaration—lands not mortgaged :—

A suit for a declaration that certain lands, from which the defendants dispossessed the plaintiffs, were not mortgaged by the latter to the former, is not governed by this article. 2 A.W.N. 173.

B.—INVALID OR VOID DEEDS.**(1) Wakfnamah :—**

A———which is not a substantial dedication of property to religious or charitable purposes is not valid. 30 C. 666—7 C.W.N. 916.

(2) Suit for possession by avoidance of a gift :—

(a) Where a deed of gift by an ancestor being unaccompanied by possession, the heir seeks possession by avoidance of the gift, the suit will be governed by the twelve years' rule and not by this article, since the gift is invalid without possession. 4 A.W.N. 60.

(b) In such a case, no cause of action would accrue to the heir unless and until the gift becomes operative by receipt of possession. 4 A.W.N. 84.

(3) Void instruments or alienations :—

(a) The article is inapplicable to a suit to recover property alienated under a deed, which is void and of no effect as against the plaintiff; there being, in such cases, no necessity to set aside the deed. 74 P.R. 1904; 52 P.R. 1895 & 185 P.R. 1886.

(b) In cases of alienations which are void, being beyond the legal competence of the alienor, there will be no necessity to set them aside. *Compare*, 28 M. 271 (P.G.)—27 I.A. 69.

Examples of inapplicability of article—(continued).**B.—INVALID OR VOID DEEDS—(concluded).**

- (c) Where a Zemindar made a grant of a village for the maintenance of a certain person during his life and the latter executed a puttah, described therein as permanent, to a lessee, a suit by the Zemindar, after the death of the grantee, for possession of the village was not barred by this article on the ground that the lease was void as against the grantor beyond the life of the grantee. 27 C. 156=26 I. A. 216=4 C.W.N. 274 (P.C.)
- (d) A suit for recovery of property by setting aside a document, which it is not necessary to set aside on the ground of its being a nullity, is not governed by this article. 30 C. 433. (23 C. 460, 12 C. 69).
- (e) Where a deed——an alienation by the guardian of a minor for purposes not binding on the latter——is void, it is not necessary for the latter to bring a suit to set aside the deed before recovering possession. 7 M.L.J. 131.
- (f) An instrument, which is null and void so far as the plaintiff's interests are concerned, need not be set aside at all. A suit for property avoiding such an instrument will not be governed by this article. 12 C. 69. Compare 5 C.W.N. 10=25 B. 337=27 I. A. 216 (P.C.).
- If, however, the deed should be valid and binding on plaintiff unless set aside, he cannot recover the property unless the deed is set aside within three years under this article. 7 C.W.N. 688.
- (g) A suit to recover possession of property by setting aside a deed disposing of the property will not be governed by this article, if the deed is void as against the plaintiff. 2 P.L.R. 1905.

C.—DEEDS NOT INTENDED TO BE OPERATIVE.**(1) Fictitious Deed :—**

Where a deed is not intended to be operative, as in the case of a fictitious deed, the article would not apply to a suit for possession of the property by avoidance of the deed, since it is not necessary, in such a case, to set it aside. 7 O.C. 319.

(2) Suit for declaration—Deed nominal :—

- (a) A suit, not for setting aside a deed, but for a declaration that it was executed for nominal purposes, is not governed by this article. 1 C.P.L.R. 165.
- (b) A suit, in which the relief prayed for is merely a declaration that a deed executed by plaintiff was executed for nominal purposes and not cancellation of the deed, the plaintiff being in possession notwithstanding the deed, is not governed by this article. 13 M. 44 ; this, notwithstanding the fact that the effect of the declaration, is the cancellation of the instrument. 10 M. 213 ; 14 M. 101.
- (c) A suit for a declaration that a purchase by D of a decree, obtained by B against C, was for his (plaintiff's) own benefit, D being only a *benamidar*, is governed by art. 120, and not by this article or art. 96. 25 C. 49.

Examples of inapplicability of article—(continued).

D.—DEEDS, WHOSE CANCELLATION IS UNNECESSARY.

(1) Suit for possession by setting aside a deed executed by guardian :—

(a) A suit by a person who, having attained majority, claimed possession of certain land by setting aside an unauthorized mortgage by conditional sale executed by his guardian during his minority, is not governed by this article, but by the twelve years' rule of limitation. 5 A. 490=3 A. W.N. 64.

(b) Similarly, where, during plaintiff's minority, his share was conveyed by his elder brother, 8 A.W.N. 256; the reason being that the plaintiff, in such cases, need not necessarily get the deeds set aside before obtaining possession. [14 I.A. 148=15 C. 58 (P.C.)], *distinguished*.

(2) Suit not falling under s. 39, Specific Relief Act :—

A suit, not strictly falling within the purview of s. 39 of the Specific Relief Act, but being one to recover possession, after a declaration of the invalidity, as against plaintiff's interest, of a deed executed by an individual having no authority to execute it, is not governed by this article. 5 A. 322=3 A. W. N. 49. Cf. 27 B. 560=5 Bom. L.R. 538.

(3) Suit for ancestral property :—

Suit to recover an ancestral occupancy holding, against persons in possession ostensibly as vendees of the plaintiff's paternal grandfather, is not governed by this article but by art. 144, the plaintiff not being bound first to obtain a declaration of the invalidity of the deed. 12 A. W. N. 26.

(4) Alienation by Hindu Mother :—

Where a mortgagee purchased the equity of redemption from the widow of the mortgagor during the minority of his son, there is no necessity for the latter to impugn the unauthorized sale, so long as his right to redeem the mortgage is not resisted by the mortgagee, and a suit for redemption of the mortgage would not be governed by art. 44. The same principle would apply to suits to which this article is sought to be applied. 14. B. 279.

(5) Alienation by Hindu father :—

This article has no application to a case, where a Hindu father sells joint family property for purposes not legally justifiable and the son seeks to recover his own share, without suing to set aside the sale in the first instance. 3 Bom. L.R. 682.

(6) Bequest without authority :—

A suit, by a reversioner, to recover immoveable property in the hands of the defendant under a will left by a testator, who had no power to dispose of the property by will, *held* not barred by reason of a suit not having been brought to contest the validity of the said will within three years from the date of the will, because there is no necessity to set aside such a deed. 25 P.L.R. 1908=19 P.R. 1908.

Examples of inapplicability of article—(continued).**D.—DEEDS, WHOSE CANCELLATION IS UNNECESSARY—(continued).****(7) Gift without authority :—**

So, also, in a case of gift. *Cf.* 140 P.L.R. 1902. But, it would be barred if the plaintiff was aware of the gift when it was made and did not dispute it at the time: 188 P.L.R. 1902; 122 P.L.R. 1902; 28 P.L.R. 1902; in such cases, it is necessary for the reversioner to sue to set aside the deeds, which would, unless set aside, be binding on them.

(8) Suit by member of joint family :—

A suit by one co-parcener for maintenance of possession in joint family property by cancelment of a deed executed by another co-parcener affecting the plaintiff's interest, is governed by art. 120 and not by this article, the plaintiff not being a party to the instrument. 16 A. 73—14 A.W.N. 1 [*distinguishing* 15 C. 58 (P.C.)].

(9) Alienation by trustee of religious endowment :—

Suit for possession by a succeeding trustee of temple property alienated by a predecessor in office is not governed by this article, because the executant had no authority in law to execute the deed and his successor in office need not sue to set it aside. 24 C. 77 (82).

(10) Spent instrument :—

There is no necessity to set aside, by suit, an instrument which has become spent and has lost all its vitality. It is like a void instrument, to set aside which there is no necessity. 4 C.W.N. 274 (P.C.).

(11) Deed not given effect to :—

(a) Where a deed is executed by a third person and it is not given effect to and the defendant has not had possession under it, the plaintiff's suit for possession, brought more than three years after the deed, will not be barred by limitation. 1 O.C. 178.

(b) But if the plaintiff has had knowledge of the deed, and if he could not succeed in the suit except by displacing the deed, this article would apply. 1 O.C. 229.

(12) Suit by reversioners to a Malabar Stanom :—

A suit by the reversionary heirs to a *stanom* in Malabar, for a declaration that a *kanom* executed by the present holder of the *stanom* was not binding on them or on the *stanom*, is governed by art. 120 and not by this article. 16 M. 138.

(13) Suit by reversioner :—

(a) The article is inapplicable to a suit by a reversioner for possession of immoveable property in the hands of the defendant, claiming under a mortgage-deed executed by the late owner, on the ground that the mortgage was without consideration and not binding on him. 155 P.R. 1888.

(b) This article is inapplicable to a suit by a reversioner for a declaration that an alienation made by his sonless uncle will not bind his interest, it being governed by art. 120. 19 P.R. 1888; 98 P.L.R. 1903—58 P.R. 1903.

(N.B.) Such a suit is peculiar to the Punjab, being governed by a special custom obtaining there.

Examples of inapplicability of article—(concluded).

D.—DEEDS, WHOSE CANCELLATION IS UNNECESSARY—(concluded).

- (c) Where the alienor's (a Punjabi widow's) powers of alienation are limited and the reversioner sues, after death of the alienor, for possession of the property, he would not be barred by this article, because he need not, in such a case, sue to set aside the deed. 116 P.L.R. 1902.

(14) Suit by assignee of a reversioner :—

A.—For recovery of possession of immoveable property, to which the reversioner becomes entitled on a Hindu widow's death, is governed by art. 141 read with art. 136, and not by this article. 8 C.W.N. 802.

(Note 2).—The article will be applicable to those cases where the substantial relief sought is cancellation of an instrument, recovery of property or other relief asked for being only by way of incidental or auxiliary relief; or where the suit is one under S. 39 of the Specific Relief Act; or where the deed, though executed by a third party, will be valid and binding on the plaintiff unless and until the same is set aside (e. g.), where the deed is a voidable one; or where the setting aside of an instrument is necessary in the interests of the plaintiff :—

Examples of applicability of article.

A.—SUBSTANTIAL RELIEF, CANCELLATION OF INSTRUMENT.

(1) Suit to set aside deed substantial relief :—

A suit to set aside an instrument is a suit for substantive relief, and not a suit for a declaratory decree. 21. W.R. 340 and 22 W.R. 438. See also, Mitra's Limitation, p. 896.

(2) Cancellation substantial relief :—

Where the substantial relief sought is the cancellation of an instrument or a declaration of its invalidity and recovery of land is only an auxiliary or incidental relief, the suit will be one under s. 39 or s. 42 of the Specific Relief Act, and will be governed by this article for purposes of limitation. 25. A. 1 (P.C.)—4 Bom. L.R. 892.

(3) Suits under S. 39, Specific Relief Act :—

(a) Where a person seeks equitable relief under S. 39 of the Specific Relief Act and asks to have a bond adjudged void and for an order to have it delivered up and cancelled, this article applies. 27 B. 560—5 Bom. L.R. 538.

(b) Where the substantial relief sought is the cancellation of the instrument or declaration of its invalidity, and recovery of property is only an incidental or auxiliary relief thereto, this article would apply. 6 C.W.N. 849.

(c) The article applies only to those cases where a bare declaration of the invalidity of an instrument is sought for. It does not apply to cases where the setting aside of an instrument is a subsidiary or auxiliary relief. 11 B. 78.

Examples of applicability of article—(continued).**A.—SUBSTANTIAL RELIEF, CANCELLATION OF INSTRUMENT—(concluded).**

- (d) This article applies only to suits brought expressly to cancel, set aside or declare the forgery of, an instrument; but it does not apply to suits where substantial relief is prayed and where the cancellation or declaration is merely auxiliary and not necessary to the granting of such relief. 16 B. 186.
- (e) This article applies only to suits brought expressly to cancel or set aside an instrument, and does not apply to suits in which substantial relief, such as the recovery of property, is prayed. 22 B. 1 (4).

(4) Suit to declare deed void :—

A suit by the *Suami* of a *mutt* for a declaration that a *Janmapatra*, whereby he appointed a person as manager of the *mutt*, was void, is governed by this article. 23 B. 375.

(5) Suit by Mahomedan heir for share of donor's property :—

Where a Mahomedan donor died without taking any step to set aside a deed of gift effected by him, a suit by his heir for share of donor's property by declaration of the invalidity of the gift would be barred, if such a suit, were it brought by the donor at the time of his death, would have been barred, the cancellation of the deed being a substantial and necessary incident of the claim. 11 A. 456—9 A.W.N. 109.

(6) Suit for cancellation of bond :—

A suit for cancellation of a bond, instituted more than three years after its execution, is barred by limitation. 3 C.P.L.R. 182.

B.—CANCELLATION OF DEED NECESSARY.**(1) Where setting aside deed is necessary :—**

The article applies to suits where it is essential to set aside a document before any other relief can be granted, even though the cancellation of such document is not expressly prayed for. 74 P.R. 1904, (*following* 12 C. 69, 57 P.R. 1891 and 52 P.R. 1895, and *not following* 16 B. 186 and 16 M. 311).

(2) Award valid until set aside :—

Where there is an award, in existence, valid until set aside, property affected by it cannot be followed after the period of limitation prescribed for setting such award aside has expired. U.B.R. (1892-1896), 475.

(3) But a partition by a *Wangany* is not necessarily an award, much less a contract; before the Court, therefore, proceeds to apply this art. or 95, it must be satisfied that there has been a contract which can be rescinded. U.B.R. (1892-1896), 478.**(4) Partition by Hindu mother :—**

A ————during the minority of the son is binding on the latter, if just and legal, unless it is set aside by him on attaining majority. Hence a suit by the minor to set aside such a partition is governed by this article, and must be brought within three years from the date of his attaining majority. 19 B. 593.

Examples of applicability of article—(continued).

B.—CANCELLATION OF DEED NECESSARY—(continued).

(5) Alienation by guardian :—

- (a) A suit by a person, after attaining majority, to recover possession of property alienated by his mother and guardian during his minority, is governed by this article, since the same is binding on the minor unless set aside. 107 P.L.R. 1904.
- (b) The article is applicable to a suit by a minor, after attaining majority, for possession of immoveable property mortgaged during his minority by a *de facto* guardian, because in such a case the deed would be binding on the plaintiff until it is set aside. 57 P.R. 1891 and 23 P.R. 1904 [referring to 57 P.R. 1891, 19 P.R. 1892, and 56 P.R. 1898 (F.B.)]

(6) Lease by Hindu widow :—

A——— is on her death voidable, and not void of itself. A suit by a reversioner, on her death, for recovery of possession of immoveable property by setting aside such a lease, is governed by this article and not by art. 141: 30 C. 990=7 C.W.N. 864 (*dislg.* 24 C. 77); because the reversioner might elect to treat the lease as valid. 25 C. 1 (P.C).

(7) Suit by third party to set aside a lease :—

A——— executed by one defendant to another is governed by this article, and time begins to run from the date when the facts entitling the plaintiff to sue become known to him. 3 A. 846 (848).

(8) Suit by reversioner :—

- (a) The article is applicable to a suit by a reversioner for possession of immoveable property^a in the hands of the defendant under a deed of gift, where the gift must be set aside before claiming possession of the property comprised in the gift. 23 P.R. 1902 =28 P.L.R. 1902.
- (b) A suit by the reversioner to recover possession of property from a person, claimed under an *ikrar-namah* upon the death of the widow of the person, by whom it purported to have been executed, must be brought within three years from the date of the death of the widow, and art. 144 would not apply. 19 C. 629.

(9) Recovery of property against one's own deed :—

- (a) If a man, not incapable of having knowledge of all the facts relating to a transaction and of allowing that knowledge to operate on his mind, executes a deed conveying his property, he cannot, afterwards, recover the property except by setting aside the deed. His suit, whether it is for recovery of the property conveyed or for setting aside the deed, must be brought within the time prescribed by this article, because the property cannot be recovered except by setting aside the deed, to which he was a party, and except after returning the price he had received from the vendee. Such a suit is, therefore, governed by this article. 15 C. 58=14 I.A. 143 (P.C.)

Examples of applicability of article—(concluded).**B.—CANCELLATION OF DEED NECESSARY—(concluded).**

- (b) This article is applicable to a case where a man has himself, under false representation or for some other reason, granted a lease, which he desires afterwards to set aside; he must bring his suit within three years of the time that he is aware of the grounds which induce him to take proceedings. 3 C.L.R. 105.

(10) Suit for share of property sold by a Mahomedan widow :—

Where a Mahomedan widow, as one of her husband's heirs to a share in his estate consisting of half of a house, sold the same to a certain person, a suit by another of his heirs to recover his share of half the house was held to be governed by this article and not art. 144, the setting aside of the deed being necessary in such a case. 10 A.W.N. 115.

(11) Declaratory suit :—

In a suit for a declaration, brought more than twelve years after a mortgage, that the mortgage in favour of the defendant, executed by the previous owner of land subsequently bought by the plaintiff, was invalid against him : *held* that, as the limitation for a suit to cancel the mortgage deed was that prescribed by this article so far as the cancellation of the deed is concerned, the plaintiff would not be entitled to such a decree. 83 P.R. 1883.

C.—ALIENATION UNDER VOIDABLE OR OPERATIVE INSTRUMENTS.

- (a) This article applies to a suit to recover property alienated under a voidable instrument, which is binding on the plaintiff until he gets it set aside by means of a suit. 1 C.P.L.R. 75.
- (b) This article governs a suit to recover possession of land against the defendant in unlawful possession thereof by virtue of a *kobala* executed by the plaintiff's father, as the plaintiff could not succeed without obtaining a declaration that the *kobala* was invalid. 6 C.W.N. 863.
- (c) The article applies only to suits in which the documents sought to be set aside were intended to be operative against plaintiff or his predecessor in title and would remain operative if not set aside. 23 C. 460.

2.—'Instrument'.**(1) Will :—**

A suit to set aside a——— is not governed by this article. 23 C. 1 (10)—22 I. A. 171 (P. C.); 4 O.C. 6.

(2) Suit contesting validity of award :—

A suit to enforce an award, so far as it is operative, in which the plaintiff contends that an unauthorized addition to the award, after it had been made, is *ultra vires*, is not a suit to set aside an instrument falling within the purview of this article. 5 C.W.N. 685 (P. C.)—23 A. 383—23 I. A. 111—3 Bom. L. R. 311—11 M. L.J. 149.

3.—'When the facts entitling the plaintiff, &c.'**(1) Suit by Mitakshara son :—**

In a family governed by the Mitakshara law, the cause of action for a suit by a son to set aside an alienation, by the father, of the family property, without the consent of the son, accrues when the purchaser obtains possession of the property. 8 W.R. 15. (F.B.)

(2) Dispossession under sham deed :—

When a mortgagor, being dispossessed of mortgaged property by the mortgagee, sues the latter for recovery of possession on the ground that the mortgage was a sham, limitation under this article, if it were otherwise applicable, would begin to run, not from the date of the bond, but from the date of the dispossession, if the mortgagor-plaintiff continued in possession notwithstanding the execution of the deed of mortgage. 25 B. 78—2 Bom. L.R. 688.

(3) Suit for possession and to set aside a deed of gift by a Mahomedan :—

A suit by one of the heirs of a deceased Mahomedan to recover her share and to set aside a deed of gift, is not governed by this article, since the cause of action arises only from the date of delivery of possession under the gift, when only the deed becomes operative. 6 A. 207 (F.B.)

(4) Knowledge of Board of Revenue :—

Knowledge obtained by the Board of Revenue in management of the plaintiff's estate during his minority is not knowledge of the plaintiff, within the meaning of this article. 6 O.C. 142.

(5) Suit against trustees :—

Where a person executed a conditional sale-deed in trust in order to protect the property from the claims of his son and the trustee-vendee obtained a foreclosure-decree and executed it contrary to the agreement between the vendor and the vendee that the possession of the vendor should not be set aside, the cause of action for a suit to set aside the sale arose only when the vendee practically disavowed the trust by seeking more than nominal execution of the decree. 1 A. 403.

(6) Suit on ground of fraud :—

- Where a suit is brought to set aside a deed, on the ground of fraud, within three years from the knowledge of fraud but more than three years from the knowledge as to the existence of the fraud, it would not be barred under this article if the cause of action for cancellation of the deed had not arisen before the knowledge of the fraud, notwithstanding the knowledge, on the part of the plaintiff, of the existence of the deed long previous thereto. 1 C.W.N. colvii.

(7) Suit to set aside a lease—knowledge at the execution :—

Where a person, not a party to a lease, who had knowledge of the lease at the time of its execution, brought a suit to set it aside, on the ground that the lessor had no right to grant the lease, more than three years after date of execution thereof, the suit was held barred under this article and art. 114 was held inapplicable to it. 1 A.W.N. 95.

General.**(1) Where the deed is set up in defence :—**

Where a minor sued on attaining majority, to recover possession of property and the defendant set up in defence a deed alleged to have been executed by the plaintiff and also by some others, it was held that this article was inapplicable, since the defendant did not get possession under the deed but only used the deed for the purpose of maintaining his possession, which he got otherwise than under the deed. 17 B. 755 (*following*, 11 B. 78).

(2) Right set up as defence :—

A right of pre-emption may be set up as an answer to a suit for possession, even though a suit to assert the right may be barred under art. 10 of the Act. 20 M. 305 (311).

(3) Sale by landlord ——— Defence of fraud by tenant :—

Where a landlord sells certain land held by a tenant and the purchaser sues the tenant for arrears of rent, the tenant, not having any independent right to impeach the sale by his own landlord, will be debarred from pleading that the sale was fraudulent and void, if the right of the landlord to set aside the sale on those grounds was already barred by limitation. 12 B. 501.

(4) Fraud as a defence :—

(a) Where a person is induced by fraud and misrepresentation to execute a deed of sale, he can, in a suit by the vendee for possession of the property comprised in the deed of sale, set up the plea of fraud, though after twelve years from date of sale. 14 B. 222.

(b) It is competent to a defendant-lessee to raise the plea of fraud, although a suit by him to set aside the plaintiff's prior lease from his lessor would be barred by this article. 17 M. 255.

(5) Grant of compensation :—

Under the circumstances of a particular case the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require. 28 B. 181 = 5 Bom. L.R. 916.

(6) Restrictions upon bequests :—

If, in the will of a Hindu, restrictions contrary to law are put upon valid dispositions made by the will and if the restrictions are separable from the dispositions, the restrictions will not invalidate the dispositions. 15 C. 409 (P.G.).

Old Law.**S. 48, Act XIV of 1855 :—**

In a suit by a person to set aside a sale deed alleged to have been executed by his father during his minority and found by the Court to be forged, the knowledge of fraud required by ——— would be computed, in the absence of proof to the contrary, from the date on which he attained majority. 6 W.R. 321.

92.—To declare the forgery of an *Three years.* When the issue or re-instrument issued⁽¹⁾ or registered becomes known to the plaintiff.

(Old Acts).

[Art. 93 of Act IX of 1871.—To declare the forgery of an instrument issued, or registered, or attempted to be enforced—*Three years.*—The date of the issue, registration, or attempt.

Act XIV of 1859 :—No corresponding provision.]

(Notes)

Scope of article.

(1) Declaration of forgery expressly prayed for :—

The article will apply only to suits brought *expressly* to declare the forgery of an instrument ; it would not apply where substantial relief is prayed and where the cancellation or declaration is auxiliary and not necessary to the granting of the main relief. 16 B. 186.

(2) Transaction nullity :—

Where a person sues for immovable property and is met by a defendant in possession founded upon a title which, as between him and that defendant, is null and void, the plaintiff is at liberty to ignore the transaction and get the benefit of the twelve years' limitation ; but if he is not at liberty to treat the title or the transaction, in which it originated, as a nullity, then the shorter period of limitation provided by this article or arts. 44, 91 or 93 would apply and his suit would be barred. 57 P.R. 1891.

(3) Suit for redemption, or recovery, of property :—

A suit for redemption or recovery of immovable property or for recovery of a debt, within the period of limitation prescribed therefor, cannot be barred by this article or art. 93, if the defendant resists the suit by relying upon a forged instrument of conveyance or a receipt and proves that the plaintiff had knowledge of its issue or registration more than three years before suit. 26 M. 291 (313).

(4) Suit for possession and cancellation of deed :—

A suit, by the heir of a deceased person, for possession of property and for cancellation, as forgery, of a deed of sale, alleged to have been executed by the deceased in favour of the defendant is governed by art. 144 and not by this article. 2 C.L.R. 10.

(5) Vendor under forged deed in possession :—

If the alleged executant of a forged or fraudulent sale deed is in possession, notwithstanding the sale, and if the purchaser under the deed brings a suit after the lapse of three years, the sale cannot, merely by the lapse of three years without the cancellation of the deed, become valid. 16 M. 811 (315).

(6) See, further, 19 C. 629 noted under art. 91 at p. 835, *supra*.

1.—‘*issued*.’

The word ‘issued’ is intended to be applied to the kinds of documents to which people commonly apply that term in business ; it has no application to an instrument such as a power to adopt or *anumatipatra*. 24 C. 1—23 I.A. 97 (P.G).

- 93.**—To declare the forgery of an *Three years*. The date of the attempt⁽¹⁾.
instrument attempted to be
enforced against the plain-
tiff.

(Old Acts.)

[Art. 93 of Act IX of 1871:—See the same printed under art. 92, *supra*.

Act XIV of 1859:—No corresponding provision.]

(Notes)

Scope of article.

- (1) See, 26 M. 291 (818) noted under art. 92 at p. 839, *supra*.

- (2) **Suit by reversioner—Genuineness of *Anumatipatra* :—**

Where the claim of an adopted son depended upon the authenticity of an *anumatipatra*, alleged to have been given to a widow by her husband, a suit by the reversioners to set aside the adoption would not be governed by this article if there had not been any attempt to enforce the instrument against the reversioners. 24 C. 1—23 I.A. 97 (P.G).

- (3) **Suit by heir for possession :—**

Where, on the death of a person, certain property belonging to him was taken possession of by another, under an alleged deed of sale from the owner, a suit by the latter's heirs for possession of the property and for setting aside the sale, was governed by art. 145 and not by art. 93 of Act IX of 1871. 2 C.L.R. 10.

1.—‘*Date of the attempt*.’

- (a) **Setting up deed and insisting on it :—**

A person's setting up a deed and insisting upon it for the purpose of his being made a party in a suit is “an attempt to enforce it” and a suit to set aside that deed must, under Act IX of 1871, be brought within three years from the date of the order making him a party. 8 C. 178—10 C.L.R. 176—8 I.A. 197 (P.G).

- (b) **Notice of attempt :—**

Where a person, having had notice of the use or attempted use of [a forged instrument, did not bring a suit to declare the forgery within three years from the date of such use or attempted use, he cannot bring such a suit by reason of any further attempt to make use of it. 4 C. 309—2 C.L.R. 573.

*1.—'Date of the attempt.'—(concluded).***(c) When cause of action arises—No fraud alleged:—**

Where no fraud is alleged, the three years' limitation will commence to run from any attempt to enforce the instrument, although the attempt might not have been known to the person, who brings the suit to declare it a forgery. 2 C.L.R. 561.

(d) Declaratory suit:—

A suit for a declaration of the plaintiff's right to her husband's share, after setting aside a will alleged to have been executed by her husband in favour of defendant's husband, is governed by this art. and time would run from the date of any attempt to enforce the instrument though the attempt might not have been known to the plaintiff, provided no fraud is alleged. 2 C.L.R. 561.

See, 16 B. 186 at p. 834, *supra.*; 17 B. 755 at p. 838, *supra.*; under art. 91. 19 C. 629; under art. 91 at p. 835, *supra.*

8 C. 178 (P.G.)—8 I.A. 179—10 C.L.R. 176; under art. 93 at page 840.

- 94.**—For property which the *Three years*. When the plaintiff is plaintiff has conveyed while restored to sanity, insane, and has knowledge of the conveyance.

(Old Acts.)

[Art. 94 of Act IX of 1871 :—Same as above.

Act XIV of 1859 :—No corresponding provision.]

- 95.**—To set aside a decree obtain- *Three years*. When the fraud be- ed by fraud⁽¹⁾, or for other comes known to the relief on the ground of party wronged⁽³⁾. fraud⁽²⁾.

(Old Acts.)

[Arts. 95 and 96 of Act IX of 1871.

Art. 95. For relief on the ground of fraud. Art. 96.

To set aside a decree obtained by fraud—2nd and 3rd Columns—Same as above.

S. 10 of Act XIV of 1859.

In suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged.

(Notes)**Scope of article.****(1) Article provides an extension:—**

This Art. provides for a period of limitation in extension of the period which, in the absence of fraudulent concealment, would, under some other article, apply to a suit and not a period less than what, under ordinary circumstances, is allowed for bringing a suit of the same nature. 28 W.R. 478.

*Scope of article—(continued).***(2) Substantial relief possession of property :—**

This article has reference to cases, where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act and desires to be relieved from the consequences of such act; and has no application to suits for possession of immoveable property when fraud is merely a part of the machinery by which the plaintiff was kept out of possession. 3 C. 504=2 C.L.R. 147.

(3) Suit by auction-purchaser for possession by avoidance of a mortgage :—

The article is inapplicable to a suit by an auction-purchaser for possession of immoveable property against a mortgagee from the judgment-debtor by avoidance of the mortgage on the ground of fraud, as it is not one for cancellation of the instrument of mortgage; the suit being for possession of immoveable property, is governed by art. 198. 6 A. 75.

(4) Substantial relief declaration of title :—

Where a suit is for a substantial relief by way of a declaration that the plaintiffs are absolute owners of the property in dispute this article would not apply. 16 B. 1.

(5) Suit for breach of contract :—

A suit on a security-bond promising to indemnify the plaintiff against the misbehaviour of a third person is not a suit for relief on the ground of fraud but one for a breach of contract. Such a suit is not governed by this article. 12 B.H.C.R.A.C. 238.

(6) Suit to recover specified sum of money :—

This art. does not apply to a suit to recover a specified sum of money which the plaintiff had to pay in consequence of the act of the defendant; it applies only where a relief is prayed for on the ground of fraud. 13 C. 155.

(7) Suit for money received by defendant :—

A suit for the recovery of money obtained by fraud and collusion is governed by art. 62 and not by this article. 2 C. 393.

(8) Suit to set aside revenue-sale :—

Where land was sold by the revenue authorities for arrears of assessment due to the *inamdar*, a suit to recover possession of the land on the ground that the sale took place in consequence of the fraud of the *inamdar* would be governed by this art. and not by art. 144. 13 B. 221.

(9) Remedy of minor affected by fraud :—

If a person, acting on behalf of a minor, fraudulently withdraws the minor's suit without obtaining leave of the Court to bring a fresh suit, the minor is at liberty to relieve himself from the consequences of the fraud. A fresh suit setting up the fraud is one of the remedies open to him. To such a suit this article will apply. 10 C. 357.

Scope of article—(concluded).

(10) **Suit by minor contesting deed of partition :—**

- (a) A suit to set aside a deed of partition on the ground of fraud is governed by this article or by art. 91 and must be brought by a minor affected by fraud within three years from the date of his attaining majority. 19 B. 593. Compare 14 A. 498—12 A.W.N. 61.
- (b) Where the members of a family entered into a division, one of them, the plaintiff, being a minor, was represented by his uncle, who was neither the guardian of the minor nor in any way entitled to dispose of the minor's interests in the property. In the partition, the minor was given less than what he was entitled to. The minor having, on attaining his majority, sued to recover his full share; *held*, the suit was not governed by this article. 14 A. 498—12 A.W.N. 61.

1.—'To set aside a decree obtained by fraud.'

(1) **Suit to set aside fraudulent decree :—**

- (a) A suit to set aside a decree, obtained by fraud, brought more than three years from the date the fraud became known to the plaintiff, will be barred by limitation by this article. 11 B. 708.
- (b) A fraudulent decree may be set aside by an original suit or by an application for review. If the party defrauded was a minor, he will have to bring his suit within three years from his attaining majority. 13 B. 137.
- (c) A decree obtained by the fraud and collusion of both the parties, is binding upon them or their privies. But a decree obtained by means of fraud of one party against the other is binding on parties and privies and on persons represented by the parties so long as it remains in force but it may be impeached for fraud and may be set aside by suit within the period prescribed by this article. 6 B. 708.
- (d) Where both the parties to a decree are guilty of fraud neither of them can get it set aside. 6 B. 703, 11 B. 708; but an innocent party may impeach it, in a subsequent proceeding in another Court of concurrent jurisdiction, on the ground that it was obtained by fraud. 26 C. 891—3 C.W.N. 670. (See Mitra's Limitation, p. 912).

(2) **Suit to set aside compromise-decree :—**

A compromise-decree can be set aside either by a regular suit or by a review of the judgment sought to be set aside. 10 C. 612.

(3) **Question of fraud cannot be gone into in appeal :—**

Where a consent-decree was passed, the question as to whether or not the decree is valid, cannot be gone into on an appeal against that decree. 5 C.W.N. 877.

(4) **Suit by son to set aside decree against father :—**

A suit may be maintained by a son to set aside a decree obtained against his father, by fraud and collusions, if, in execution of such decree, property belonging to the son is attached and brought to sale. 16 M. 198.

2.—'Other relief on the ground of fraud.'

(1) Suit to set aside award :—

The cause of action for a suit to set aside an award begins to run from the date of the award. U.B.R. (1892-96), 475.

(2) Partition by Ywagaung :—

A suit for recovery of land included in a partition by a *ywagaung* is not governed by this art. as the distribution by the *ywagaung* cannot be called a decree. U.B.R. (1892-96), 478.

(3) Suit for property by setting aside foreclosure decree :—

A suit for possession of property foreclosed, by setting aside the foreclosure-decree on the ground of fraud, is governed by this article. 16 C.P.L.R. 181.

(4) Suit for value of goods :—

Where the defendant obtained delivery of goods by fraudulently representing himself to be the agent of the plaintiff's creditor, a suit for the value of goods so delivered is governed by this article. 19 P.R. 1878.

(5) Suit for rectification of deed—Fraud :—

A suit for the rectification of a deed on the ground that the plaintiff was induced by the defendant to allow certain conditions to be entered in it by fraud is governed by this article. 62 P.R. 1901.

(6) Suit for setting aside a revenue sale :—

(a) This article is applicable to a suit to set aside a sale of land sold, as if for arrears of revenue, on the ground of fraud and to recover possession of land from the purchaser. 9 M. 457.

(b) But see 12 M. 168 (F.B.), which decides that a suit to set aside a Revenue sale on the ground of fraud, the plaintiff having had knowledge of the fraud more than six months before suit, is not governed by this art. but is governed by the special period of limitation of six months provided by S. 59, Madras Act II of 1864.

(c) Compare 7 M.L.J. 73, where it was held that S. 59 of Madras Act II of 1864 was inapplicable to cases where relief other than setting aside a sale, to which alone the section was applicable, is prayed for. To such cases, art. 95 of the general Limitation Act is applicable.

(7) Compensation-money paid to a wrong person :—

Where, by fraud or mistake, compensation money under the Land Acquisition Act is awarded to a wrong person, limitation will run against the real owner thereof only from the date of his becoming aware of the fraud or mistake and this article or art. 96 would apply. 6 M. 844.

(8) Suit for compensation on ground of fraud :—

The "other relief" referred to need not be of the same kind as "setting aside a decree obtained by fraud" and the operation of the article is not limited to specific relief on the ground of fraud. A suit for compensation on the ground of fraud practised by the defendant is governed by the article. 27 M. 343.

2.—'Other relief on the ground of fraud.'—(concluded).

(9) Suit by beneficiaries:—

A suit brought by the grantees of certain property granted for the maintenance of themselves and a *mosque*, (against the superintendent of the *mosque* and some other persons, who had sued him for removal from office and had entered into a compromise with him) for the setting aside of the compromise on the ground of fraud, falls under this article and not under S. 10. 5 A. 294=3 A.W.N. 40.

(10) Suit to set aside sale on ground of decree being fraudulent:—

A suit to set aside an execution sale on the ground that the decree was obtained by fraud is maintainable and is governed by this article. 26 C. 326 (Note)=3 C.W.N. 395.

(11) Declaration—purchase of decree benamée:—

A suit for a declaration that a decree, which had been purchased in the name of defendant, had really been purchased by the plaintiff for his own benefit, is not a suit for relief on the ground of fraud within the meaning of this article. 25 C. 49.

(12) Relief against fraud of a co-sharer:—

Where one of several co-sharers, fraudulently, contrived to have an estate brought to sale for arrears, under Act XI of 1859, and purchased it *benamée* in the name of his son, a suit to set aside the sale brought by another co-parcener within three years from the date of sale was in time. 8 C. 800.

(13) Suit by assignee against decree-holder assignor:—

Where a decree-holder sells his rights under the decree to another and, afterwards, fraudulently realises money due under the decree from the judgment-debtor, a suit by the purchaser against the decree-holder for the recovery of money fraudulently realised will be governed by this article, the cause of action dating from the date of the realisation of the money. 10 W.R. 104=1 B.L.R.A.C. 76.

(14) Competency of purchaser to prove fraud in decree:—

The purchaser of a property is at liberty to prove that a mortgage-decree upon the property was fraudulently and collusively obtained by another person, though his purchase might be subsequent to the decree. 12 C. 156.

3.—'When the fraud becomes known.'

(1) Knowledge, nature of:—

- (a) The knowledge predicated by the article is not mere suspicion but such definite knowledge as enables the person defrauded to seek his remedy in Court. 6 A. 406=4 A.W.N. 140.
- (b) The man who committed the fraud must show that the plaintiff, the man injured by the fraud and suing to recover possession of property, had clear and definite knowledge of those facts which constituted the fraud at a time which is too remote to allow him to bring the suit. The

3.—‘When the fraud becomes known.’—(concluded).

burden would not be discharged by proof that some hints and clues had reached the person defrauded. 14 B. 408; on appeal, 17 B. 341 (347)=20 I.A. 1 (P.C.).

(2) Ascertainment of knowledge of fraud :—

In cases of fraud, in which a question of limitation is involved, the Court must ascertain when the plaintiff first had knowledge, actual or constructive, of the fraud. 20 C. 425.

(3) Consummation of fraud :—

The cause of action for a suit to set aside a sale of a *putnee* held in consequence of the fraudulent failure of one of two co-owners to pay his share of the rent due to the Zemindar, accrues against the other co-owner at the date of sale, when the fraud becomes consummated. 9 W.R. 559.

(4) Suit by reversioner :—

This article governs a suit by a reversioner for a declaration that a sale in execution of a decree obtained against the widow, as the representative of her deceased husband's estate, is inoperative as against him, on the ground that the decree was collusive and fraudulent, the cause of action arising from the date he was aware of the fraud. 11 B. 119.

General.

(1) Party's setting up his own fraud :—

(a) It is competent for a party to a suit to plead that a compromise-decree in a former suit between himself and the other party to the suit, was obtained by fraud. 27 C. 11.

(b) It is competent for a party to a suit to prove that a decree against him in another Court of concurrent jurisdiction was fraudulently obtained. 26 C. 891.

(2) Fraud as a defence :—

(a) Where a suit is brought by a vendee for possession of property purchased by him, the plea of fraud can be raised by the vendor, who has been all along in possession of the same, even after twelve years from the date of sale, even though he had not sued to set aside the deed within the time limited by this article. 14 B. 222.

(b) Where, in a suit, defendant sets up the plea of infancy, it is competent for the plaintiff to put in a replication setting up fraud in answer. 2 C.W.N. 18.

(c) Where the right of a defendant or the person through whom he claims to impeach a transaction by bringing a suit on the ground of fraud is barred by limitation, he cannot set up fraud as a defence to an action brought against him. 12 B. 501.

(d) But, if the defendant had been in possession, which possession was never disturbed, notwithstanding the fact that he entered into a transaction with the plaintiff in relation to the property he (defendant) may,

General—(concluded).

though his right to impeach the transaction might have been barred, set up his possession and the fraud affecting the transaction as a defence. *Compare* 15 B. 299.

- (e) A party to a suit may, as defendant in a second suit, impeach a decree *inter partes* proved against him in the second suit, without being affected by limitation. 27 C. 11—3 C.W.N. 660 (*See* Mitra's Limitation, p. 912).

(3) Burden of proof of knowledge:—

It is for the defendant to alledge and prove that the plaintiff was aware of the fraud on a date earlier than that assigned in the plaint. 1 N.L.R. 20.

(4) Jurisdiction of High Court:—

The High Court has original jurisdiction to entertain a suit to set aside a decree of a Mofussil Court on the ground of fraud. 30 C. 369.

(Old Law.)

A suit to obtain re-possession of property by setting aside a prior decree in respect of the same property on the ground of fraud was, under Act XIV of 1859, governed by six years' limitation. 6 W.R. 165.

96.—For relief on the ground of *Three years*. When the mistake becomes known to the plaintiff⁽¹⁾.

(Old Acts.)

[Art. 97 of Act IX of 1871:—For relief on the ground of mistake in fact—2nd and 3rd columns, same as above.

Act XIV of 1859:—No corresponding provision.]

(Notes)

Scope of article.

(1) Mistakes in law and in fact:—

The article applies both to mistakes in law and those in fact. 20 B. 511 (516).

(2) Mistake of Law:—

The rule that money paid under a mistake of law cannot be recovered is limited to cases of mistake as to a general rule of law. 6 C.W.N. CXXIX.

1.—'Relief on ground of mistake.'

(1) Error of law does not vitiate contract:—

Unless fraud or misrepresentation is involved, an error of law does not vitiate a contract or annul a conveyance. 11 B. 174.

(2) Money paid to wrong person under Land Acquisition Act:—

Where money was paid under the Land Acquisition Act to a wrong person either by fraud or through mistake, a suit by the real owner for the recovery of the money would not be barred if brought within six years from the date on which he became aware of the fraud or mistake. 6 M. 344.

1.—'Relief on ground of mistake.'—(concluded).

(3) Suit by minor to recover his full share on partition :—

Where a partition was effected to the detriment of a minor, a suit by the minor, on attaining majority, to recover his full share in the family property is not governed by this article or art. 95. 14 A. 498—12 A.W.N. 61.

(4) Suit for excess road-cess :—

A suit to recover money paid in excess of the sum demandable on account of road-cess is governed by this article and not by the limitation contained in S. 27, Bengal Act VIII of 1869. 12 C. 588.

(5) Suit for excess canal dues :—

A Civil Court has no jurisdiction to entertain a suit to recover the excess canal dues paid by mistake (*Vide* S. 241 (1) of the N.W.P. Land Revenue Act and S. 45 of the Northern Indian Canal and Drainage Act). 25 A. 527 (P.C.)

2.—'When the mistake becomes known to the plaintiff.'

When period commences :—

The period does not commence when the plaintiff's suspicions are aroused but when he actually discovers the mistake. 25 A. 527 (590) (P.C.)

97.—For money paid upon an ex- *Three years.* The date of the failing consideration which afterwards fails⁽¹⁾. ure⁽²⁾.

(Old Acts.)

[Art. 98 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Money under decree since reversed ;—

The article is inapplicable to a suit to recover money drawn out of Court under a decree since reversed, as it is not a contract in which there is 'failure of consideration' within the meaning of this article. 19 M. 487.

(2) Transactions void ab initio :—

(a) The article is inapplicable to transactions void *ab initio*. 3 C.P.L.R. 178.

(b) Where a vendee found it impossible to obtain possession, the sale deed being void *ab initio* (the vendor having no title at all to convey), a suit to recover the purchase-money from the vendor held not governed by this article. 25 B. 598.

(3) Vendor having no title to convey :—

Where a vendor had no title to convey and was not in possession at the date of the sale and the purchaser sues for recovery of the purchase-money, the suit was held governed by art. 62 and not by this article.—*Per* Candy and Chandavarkar, JJ.

Scope of article—(concluded).

Per Whitworth, J.—This article did apply, the consideration failing when the vendee could not obtain possession of the property. 3 Bom. L.R. 190.

(4) Sale since become voidable :—

Where, in the case of a sale by a member of a joint Hindu family, not void when effected but since become voidable, on account of resistance offered by the other members of the family, the purchaser sues for the purchase money, this article or art. 62 will apply. 15 C. 51 on appeal 19 C. 123—18 I.A. 158 (P.C.).

(5) Sale since declared invalid :—

The article is applicable to a suit to recover the purchase-money paid for a sale of property since declared invalid, the cause of action accruing from the date the sale was declared invalid. 5 M.L.J. 32.

(6) Sale since becoming void :—

A sale was not void *ab initio* but failed subsequently by reason of a judgment of Court. A suit by the vendee, under such circumstances, for recovery of the purchase-money held governed by this article, the cause of action arising from the date of the judgment. 18 M. 173.

 See, further, cases under Headings Nos. 1 and 2, *infra*.

I.—‘Upon an existing consideration which afterwards fails.’**(1) Failure of suit for specific performance :—**

A suit for specific performance having become unsuccessful, a subsequent suit to recover money paid on the consideration that has failed, is governed by this article, the cause of action arising from the date of the dismissal of the first suit. 24 M. 27—10 M.L.J. 217.

(2) Decree for specific performance reversed on appeal :—

Where a decree for specific performance of a contract of sale was reversed, on appeal, the cause of action for a suit by the alleged purchaser to recover the sum paid by him as deposit for sale would arise from the date of the decision on appeal. 11 W.R. 24—9 B.L.R.A.C. 170.

(3) Mortgagee's claim for mortgage-money :—

A claim by a mortgagee for recovery of the mortgage-money on the ground of the mortgagor's failure to secure possession to the mortgagee is not governed by this article, since the liability is not one arising under the common law but one imposed by S. 68 of the Transfer of Property Act. To such a case, article 116 or 120 would apply. 21 M. 242—8 M.L.J. 81 (*distg.* 11 B. 475 on the ground that when the case was decided, the Transfer of Property Act was not in force in Bombay).

(4) Suit by mortgagee against mortgagor :—

Where a mortgage-deed contains no personal covenant by the mortgagor to pay the loan and the mortgage security comes to an end by reason of the mortgagor's default in paying the Government revenue, a suit by the

1.—‘Upon an existing consideration which afterwards falls.’—(contd.).

mortgagee to recover the money, personally, against the mortgagor is governed by this article, the cause of action accruing from the date of the failure of the mortgage consideration. 11 B. 475.

Compare 21 M. 242 = 8 M.L.J. 81.

(5) Suit by mortgagee for mortgage-money :—

A suit by a mortgagee for recovery of the mortgage-debt personally against the mortgagor, the mortgaged property having been sold for arrears of municipal taxes, is governed by this article or art. 116. 1 P.L.R. p. 201.

(6) Partial failure of consideration :—

A suit to recover balance upon a partial failure of consideration is governed by this article, the cause of action accruing from the date the consideration partially failed. 24 M. 27 = 10 M.L.J. 217.

(7) Suit by auction-purchaser for purchase-money :—

A ——— under S. 815, Civil Procedure Code, the judgment-debtor having had no saleable interest and the purchaser being deprived of possession, is governed by this article, the cause of action accruing when he (the purchaser) is deprived of possession. 22 B. 783.

(8) Short delivery of goods sold :—

Where goods sold, which have been already paid for, are afterwards found to be short-delivered, a suit for recovery of money overpaid will be governed by this article, the cause of action dating from the date of delivery. 14 C. 457.

(9) Judgment-debt paid out of Court :—

A suit by a judgment-debtor to recover the amount paid out of Court in execution of a decree, but which the decree-holder declined to give credit to, is governed by either this article or art. 115. 79 P.R. 1892.

(10) Failure by disturbance of possession :—

Where, for the amount due to the plaintiff by the defendant, the latter executed a mortgage-deed, by which he placed the plaintiff in possession of the property mortgaged, but subsequently deprived him of possession by taking advantage of the non-registration of the mortgage-deed, a suit by the plaintiff for the recovery of the amount due to him from the defendant was governed by this article. 193 P.R. 1388.

(11) Want of registration and disturbance of possession :—

The assignment of a mortgage having failed for want of registration and the possession given to the assignee at the date of the assignment having since been disturbed owing to the redemption by the mortgagor, a suit to recover the consideration paid for the assignment held governed by this article, the cause of action arising from the disturbance of possession. 25 M. 396.

(12) Suit by would-be lessee to recover advance :—

Where a suit for specific performance of a contract to grant a *Zuripeshgi* lease failed in consequence of the non-payment of consideration-money in

1.—‘Upon an existing consideration which afterwards fails.’—(concl'd).

time, a suit, by the would-be lessee, for the recovery of money paid as advance, brought more than three years after the date agreed upon for the execution of the lease, was barred. 7 N.W.P. 199.

(13) Suit for money paid by a pre-emptor :—

A———under a decree for pre-emption which afterwards became void is governed by this article or art. 120, the cause of action arising on the date the decree became void. 8 A. 273=6 A.W.N. 95.

See, further, cases under Heading No. 2, *infra*.

2.—‘The Date of the failure.’

(1) Purchaser resisted in taking possession :—

Where the purchaser of certain property is resisted in taking possession of it, the period of limitation for a suit by him to recover the purchase-money would commence to run from the date of the effectual resistance. A.W.N. (1901), 24.

(2) Suit by purchaser resisted in taking possession :—

A claim for damages by a purchaser, who is resisted in taking possession of the property, the suit being based on a covenant for title and quiet enjoyment, is governed by this article and not art. 83, the failure of consideration taking place when he found himself unable to obtain possession. 26 B. 750=4 Bom. L.R. 571.

(3) Suit on covenant in sale deed :—

A———against dispossession of vendee, for recoupment of consideration-money paid for sale, held to be in time if brought within three years of dispossession. 26 A. 519=A.W.N. (1904), 92.

(4) Refund of amount of debt on failure of sale :—

Where, in contemplation of a sale by a debtor to a creditor, a book-debt was allowed to be retained by the former as consideration for the sale, but it afterwards turned out, in a suit for specific performance, that no effectual agreement of sale had been come to, held, a fresh cause of action arose for the book-debt on the finding of the Court as to the agreement for sale being unenforceable. 11 A. 47 (P.C.)=15 I.A. 211.

(5) Specific performance or refund in the alternative :—

If, in a suit for specific performance of an agreement to sell or for refund of the consideration-money paid, the High Court, in second appeal, finds the agreement to be unenforceable, the cause of action for the refund arises on the date of such finding and would be governed by this article. 25 A. 618.

See, further, Cases Nos. 1, 2, 4, 6, 7, 8, 11 & 13 under Heading No. 1, *supra*.

(Old Law.)

Durputnee cancelled by sale of putni :—

A suit to recover consideration-money paid for a *durputnee* cancelled by the sale of the *putnee* for arrears of rent was governed by the general rules of limitation under Act XIV of 1859 and not by special rules of limitation in cl. 5, s. 7, Reg. VIII of 1819. 3 W.R.S.C.Ref. 2.

- 98.**—To make good out of the general estate of a deceased trustee⁽¹⁾ the loss⁽²⁾ occasioned by a breach of trust. *Three years.* The date of the trustee's death, or, if the loss has not then resulted, the date of the loss.

(Old Acts.)

[Art. 99 of Act IX of 1871.—Same as above.]

Sec. 2 of Act XIV of 1859.—

* * * * *

No suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding section, to be computed from the decease of such trustee.]

(Notes)

Scope of article.

The suit under this article is not for recovery of the trust property but for compensation for loss. See Mitra on Limitation, p. 917 and compare 8 B. 492 (469).

1.—'Trustee.'

Executor made express trustee :—

An executor, who by the will is made an express trustee for certain purposes, is, as to the undisposed of residue, a trustee, within the scope of this article. 2 B. 388.

2.—'Loss.'

Loss occasioned by a deceased Director of Company :—

The word 'loss' in this article means 'loss of specific property.' So a suit to recover certain amount from the estate of a deceased Director of a Company for the loss occasioned by the misfeasance of the Director is not governed by this article. 9 B. 373.

- 99.**—For contribution by a party who has paid⁽¹⁾ the whole amount⁽²⁾ due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers. *Three years.* The date of the plaintiff's advance⁽³⁾ in excess of his own share.

(Old Acts.)

[Art. 100 of Act IX of 1871.—Same as above.]

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

- (1) This article does not apply to all kinds of claims for contribution but is limited to cases where the *whole* amount due on a joint decree or the *whole* revenue due in respect of a joint estate is paid by one of the judgment-debtors or one of the co-sharers. 1 P.L.R. p. 149.
- (2) The article would not apply where the plaintiff has not paid money due under a joint decree nor where the plaintiff is not a sharer in a joint estate suing for contribution for revenue paid by him. So, the article would not apply to a suit by the owner of two villages sold under a decree on a mortgage claiming contribution proportionately against the owners of the other properties included in the mortgage. 12 A 110—10 A.W.N. 31.
- (3) Suits for contribution are governed by the three years' limitation and not by art. 120. 7 A.W.N. 128.
- (4) A suit for contribution by one partner against other partners, the plaintiff-partner being, under an agreement between the partners, authorized to borrow money on his individual credit and apply the same towards the partnership business and he being compelled to pay the amount, is governed by this article. 26 C. 254—8 C.W.N. 299.

(5) **Suit by dispossessing co-sharer against the dispossessed:—**

Where, one of two co-sharers is wrongfully kept out of possession by another and the latter pays the whole of the Government revenue including that payable by the dispossessed co-sharer, he cannot maintain a suit for contribution against the dispossessed co-sharer, the reason being that, by the act of dispossession, he (dispossessor) enjoys the profits due to the other co-sharer also. To such a case, the article applicable is No. 61 and not this article. 6 C.W.N. 903.

(6) **Second suit by a decree-holder in a contribution suit:—**

Where the decree-holder in a contribution suit was unable to realize the amount decreed against one of the defendants, a suit against the other defendants to make up the deficiency was governed not by this article but by art. 120. 1 P.L.R. 149.

A.—Where the plaintiff is not entitled to a charge.

- (a) Where the person making the payment of assessment has no charge on the defendant's share of the estate, either this article or art. 61 and not art. 120, would apply to a suit for contribution. Per Bhashyam Ayyengar, J., in 26 M. 686—13 M.L.J. 83.
- (b) For example, see 15 M. 258, where one of two co-tenants paid the whole of the rent due to a Mittadar and sued the other for contribution; it was held that this article was applicable and the suit was barred.
- (c) A co-sharer, who has paid the whole revenue and thus saved the estate, does not, by reason of such payment, acquire a charge on the share of the defaulting co-sharer. A suit for contribution by him would be

A.—Where the plaintiff is not entitled to a charge.—(concluded).

governed by this article and not art. 132. 14 C. 809 (F.B), *overruling* 14 B.L.R. 155, *explaining and distinguishing* 11 M.L.J. 241 at p. 258 and *approving* 8 C. 402.

- (d) Where the plaintiff's and defendant's lands, though separately assessed, were covered by the same *town* number and the plaintiff paid the arrears of revenue due by the defendant in order to save his own property from being sold for arrears of revenue, a suit for the recovery of the amount so paid would be governed by this article and not by art. 132, because the plaintiff has no charge on the defendant's property. 15 C. 542 (*following* 14 C. 809).
- (e) Where the plaintiff paid the assessment as full owner of the property and it was entirely by his own action that the defendants were excluded from the property and did not pay their *quota* of the assessment, a suit to recover the assessment paid by him (plaintiff) for their shares will be governed by this article and not art. 132, as, under the above circumstances, the payments cannot create a charge on the shares of the other co-owners. 11 B. 313.

B.—Where the plaintiff is entitled to a charge.

- (a) Where a part-owner of an estate pays the revenue due on the whole estate in order to save his own interests from sale, he will be entitled to a charge on the share of the other owner for the amount due by him as contribution. To such a suit, art. 132 and not this article would apply. 11 M. 452.
- (b) Where one of two or more co-sharers pays the entire revenue to save the whole estate from liability to sale, he will, by operation of law, be entitled to a charge upon the share of each of the sharers. To such a case, art. 132 and not this article will apply. 26 M. 686. 18 M.L.J. 83 (F.B.), *following* 11 M. 452 and *dissenting* from 11 B. 313, 14 C. 809 and 14 A. 273.
- (c) Where the plaintiff pays the revenue due on the estate of the defendant neither under a decree nor as a joint proprietor and claims a lien on the estate for the payment, the suit will be governed by art. 132 and not by this article. 6 C. 549=8 C.L.R. 209.

I.—'Paid'

- (1) Quære :—Where, in execution of a joint decree against plaintiff and defendant, the plaintiff's property was alone sold, a suit for contribution is governed by this art. or art. 120, there being no payment by the plaintiff? 4 C. 529?
- (2) The article is applicable whether the amount was paid voluntarily by the plaintiff or the same was realized by sequestration and sale of his property or he paid the money to avoid a coercive process. 26 M. 686 (686)=18 M.L.J. 83———*Per Bhashyam Ayyengar, J.*

But see 4 C. 529 and 20 M. 23 noted at p. 781 of the *Lawyer's Companion*, *supra*.

2.—'Whole amount.'

The article is inapplicable where not the *whole* but only a *part* of the money due under a joint decree is realized from the plaintiff. 20 M. 23.

3.—'The date of the plaintiff's advance.'

(1) Payment under a joint decree:—

In a suit for contribution by a person, who has paid the whole amount due under a joint decree against him and the defendant, limitation runs from the date the excess payment was made to the decree-holder. 3 C.L.R. 480; 6 C.L.R. 62; 5 C. 720.

(2) Date of payment:—

(a) In a suit for contribution, limitation runs from the date of payment of the money sued for. 6 B.L.R. App. 101; 6 B.L.R. 103 (Note.)

(b) In a suit for contribution by a co-sharer, who has paid the Government revenue, the cause of action arises from the date the money was paid to the Government on account of his defaulting co-sharers and not from the date the lender of the money for the payment of the Government revenue realized it from plaintiff under a decree of Court. 7 W.R. 29.

(3) Payment under a rent-decree:—

In a suit for reimbursement by a co-sharer, who has paid the whole amount due under a rent-decree obtained by the Zemindar, limitation runs from the date of payment by the plaintiff and not from the date of the decree. 2 W.R. 159.

(4) Existence of decree *per se* no ground of suit:—

A mere existence of a joint decree does not afford ground for a suit for contribution, but it is the *payment* there-under that affords a cause of action. 11 B.L.R. 76.

General.

(1) Jurisdiction.—

A suit for contribution under this article does not lie in a S. C. Court. 7 W.R. 377 (F.B.) 22 B.L.R. Sup. Vol. 675; 23 C. 189.

But see 15 C. 652 (F.B.) which holds that the suit lies in a S. C. Court. This decision has been abrogated by Act IX of 1887.

See, now art. 41, Schedule II of the Provincial Small Cause Courts Act.

(2) Claim purely personal:—

A claim for contribution creates only a personal liability against the co-sharers, on account of whose shares the payment is made. Where, therefore, a co-sharer for whom payment is made is a widow, a decree ought not to be made, after her death, against her husband's estate in the hands of reversioners but against those who would inherit her *sridhan*. 25 C. 565.

(3) Whether defendant would be absolved on ground of limitation:—

In a contribution suit, brought by plaintiff against defendant, the latter is not absolved from liability to the former, simply because, as between defendant and the original creditor, the claim against defendant was barred by limitation and against plaintiff it was decreed. 2 U.B.R. (1897—1901), 331.

(Old Law).

- (a) A suit for contribution by a surety was governed by cl. 16, S. 1, Act XIV of 1859. 3 W.R. 184.
- (b) A suit for contribution by a co-sharer who paid the Government revenue for the whole estate was governed by cl. 16, S. 1, Act XIV of 1859. 2 N.W.P.H.C. 52.
- (c) A suit for reimbursement of rateable shares of joint decree was governed by cl. 16, S. 1, Act XIV of 1859. 2 W.R. 266.

100.—By a co-trustee to enforce *Three years*. When the right to contribution accrues against the estate of a deceased trustee a claim for contribution.

(Old Acts.)

[Art. 101 of Act IX of 1871.—Same as above.

S. 2, Act XIV of 1859.—

Provided that nothing herein contained shall prevent a co-trustee from enforcing against the estate of the deceased trustee, any claim for contribution, if he shall institute a suit for that purpose within six years after such right of contribution shall have arisen.

(Notes)**Scope of article.****Suit against co-trustees:—**

A suit for contribution against co-trustees is not governed by this art. but by art. 120. 20 M. 398.

101.—For a seaman's wages. *Three years*. The end of the voyage during which the wages are earned.

(Old Acts.)

[Art. 102 of Act IX of 1871.—Same as above.

Act XIV of 1859.—*No corresponding provision.*]

102.—For wages not otherwise *Three years*. When the wages accrue expressly provided for by this schedule due.

(Old Acts.)

[*No corresponding provision in either of the Old Acts.*]

(Notes)

(1) Suit by employe for wages :—

A suit by an employe for the wages due to him must be brought within three years from date of his leaving his master's services, unless there was any subsequent account stated and settled between them. 19 W.R. 159.

(2) Suit by Mookhtear :—

A suit by a Mookhtear, who was engaged upon a distinct contract that he would be paid a fixed monthly salary, for recovery of salary due to him was governed by cl. 9, S. 1, Act XIV of 1859. 6 W.R. Civil Ref. 11.

103.—By a Muhammadan for exi- *Three years.* When the dower is demanded & refused⁽¹⁾, or (where during the continuance of the marriage, no such demand has been made) when the marriage is dissolved by death⁽²⁾ or divorce.

(Old Acts.)

[Art. 103 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.—But suits for dower were in some cases treated as suits for breach of contract—see Notes below.]

104.—By a Muhammadan for *Three years.* When the marriage is deferred dower (*nu'wajjal*). dissolved by death or divorce.

(Old Acts.)

[Art. 104 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(N.B.)—Arts. 103 & 104 may be read together.

(Notes)

Scope of articles.

(1) Suit by Mahomedan widow :—

A suit by a Mahomedan widow to recover the amount of her dower was governed by cl. 16, S. 1 of Act XIV of 1859 and not cl. 12 of the section, since her right did not constitute an interest in immoveable property. 10 Bom. H.C.A.C. 430.

(2) Suit to establish lien for dower :—

Where a widow was ousted from her husband's property, a suit by her to establish her lien on the property for her dower was governed by cl. 16,

Scope of article—(concluded).

S. 1, Act XIV of 1859, (six years) but a suit to declare that her husband's landed property was subject to her lien would have been governed by cl. 12, S. 1 of the Act (twelve years). 8 W.R. 51 and 9 W.R. 318.

(3) Whole estate charged:—

Where a Mahomedan, without impignoring his estate, charged the whole of it by a deed of dower with a certain sum, when demanded by his wife, a suit by his wife to recover the dower was not governed by the limitation provided by S. 14, Bengal Reg. III of 1793. 6 M.I.A. 211.

(N.B.)—Suits to establish a lien on immoveable property for dower would now be governed by art. 132.

1.—'Exigible Dower'.**(1) Presumption is prompt dower:—**

In the absence of proof to the contrary, the presumption is that a dower is prompt and art. 103 would apply to such a case. 9 A.W.N. 122 (*refg.* to 8 A. 149 and 15 B.L.R. 306); 19 W.R. 315 (P.C.).

(2) Suits for money claim and those for lien:—

A suit by a Mahomedan widow for a money claim for a dower due to her and a suit by her for a lien on her husband's property for the dower were based upon distinct causes of action and governed by different periods of limitation. 8 W.R. 307.

2.—'Demanded and refused.'**(1) Requisites for the starting of limitation:—**

The—under this article are (1) a definite demand and (2) a definite refusal. A demand alone is insufficient. 9 A.W.N. 122 and 63 P.R. 1892.

(2) Demand for a portion of dower:—

Where a portion of her dower was demanded by a Mahomedan wife, limitation as to the portion not demanded will run from the death of her husband and not from the date of demand of the portion. 6 W.R. *Civil Ref.* 19.

(3) Prompt dower-commencement of limitation:—

In the case of prompt dower, limitation does not begin until the dower is demanded or the marriage is dissolved by death or otherwise. 11 B.L.R. 375 = I.A. Supl. Vol. 135.

(4) Rejection of application to sue in forma pauperis:—

Where an application by a Mahomedan lady to sue her husband in *forma pauperis* was rejected, no limitation ran for recovery of her prompt dower. It is only when the application is granted that a demand can be said to have been made. 24 W.R. 163 = 15 B.L.R. 306 (P.C.).

2.—‘Demanded and refused.’—(concluded).**(5) Refusal to pay dower :—**

Where a Mahomedan wife made an application to the Court for permission to sue as a pauper to recover her dower and on that occasion her husband refused to pay the demand, such refusal furnished cause of action and limitation ran from that date under cl. 9. s. 1, Act XIV of 1859, so far as prompt dower was concerned. 13 W.R. 371=5 B.L.R. 84.

(6) Suit by wife against husband :—

(a) A suit by a Mahomedan wife against her husband for her dower was not barred under any of the sections of Act XIV of 1859, since the cause of action arose only when the suit was instituted and not at any earlier period. 2 B.H.C.R.A.C. 291.

(b) In the life-time of the husband the cause of action for dower does not arise until a demand for it. 2 B.H.C.R.A.C. 293.

(7) Burden of Proof :—

The defendant, who desires to raise the plea of limitation, must allege and prove the date on which he finally refused to pay the dower : in the absence of such proof, the allegation in the plaint will stand good and the suit will not be barred by limitation. 9 A.W.N. 122.

3.—‘When the marriage is dissolved by death.’**Suit by heirs of a Mahomedan woman :—**

A suit by the heirs of a Mahomedan woman to recover deferred dower due to the latter from her husband must be brought within three years from the date of her death. 2 B.L.R.A.C. 306.

General.

(1) Where a Mahomedan widow in possession of her husband's property in lieu of her dower is dispossessed by his heirs, the heirs take the estate subject to her lien for the amount of her dower. 3 B.L.R.A.C. 175.

(2) Where, on an application, by a Mahomedan woman for leave to sue as a pauper for the recovery of dower due to her, being objected to on the ground that she was not entitled to sue as a pauper, she deposited the Court-fee necessary for a regular suit, with a prayer that her application might be treated, and proceeded with, as the plaint in the suit, but, by the time the deposit was made, the time prescribed by this article had expired, the suit was barred, S. 5 not being applicable to the case. 18 A. 206.

(3) Suit by wife for recovery of money lent to husband :—

Where a Mahomedan obtained a loan from his wife on condition that the amount would be repaid in the event of a divorce taking place between them or out of his effects at his death, a suit to recover the amount was not governed by the Mahomedan Law of dower but was governed by three years' limitation calculated from the date of divorce or death of the husband. 5 M.H.C. 280.

- 105.**—By a mortgagor after the *Three years*. When the mortgagor mortgage has been satisfied, to recover surplus collections received by the mortgagor. re-enters on the mortgaged property.

(Old Acts.)

[Art. 105 of Act IX of 1871.—Cols. 1 & 2 same as above: Col. 3—The date of the receipt.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—‘Surplus collections received by the mortgagee.’

Suit by mortgagor for surplus collections:—

Where the mortgagor deposited in Court certain sums for the mortgage and the mortgagee refused to accept it, a suit by the mortgagor, after he obtained possession of the mortgage property in execution of a decree for redemption, to recover from the mortgagee the excess rents and profits collected by him and the value of trees alleged to have been sold by him, is governed by this article. 4 O.C. 355.

Old Law.

A suit by a mortgagor to recover the surplus collections received by the mortgagee was governed by cl. 16, S. 1, Act XIV of 1859; whereas a suit by him to recover the mortgaged property was governed by cl. 15, S. 1 of the Act. B.L.R. Sup. Vol. 901=9 W.R. 187 (F.B.).

Limitation under Act IX of 1871:—

Under Act IX of 1871, article 105, the suit was governed by a period of three years commencing from the date of the receipt of the surplus profits. *Vide* 6 A. 308 at p. 311 and article 105 of Act IX of 1871.

- 106.**—For an account and a share *Three years*. The date of the dissolution of the profits of a dissolved partnership⁽¹⁾. tion.

(Old Acts.)

[Art. 106 of Act IX of 1871:—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Suit for declaration or for dissolution:—

A suit, by some of the partners of a firm against another partner and a mortgagee from him of partnership property, for the purposes of the firm, for a declaration that the plaintiffs were the partners with the mortgagor-partner, that if the partnership had been dissolved the date of the dissolution might be fixed or, if it should be held that the partnership was subsisting, it might be dissolved, was held governed by art. 120 and not by this article. 4 A. 437=2 A.W.N. 289.

Scope of article—(concluded).

(2) Suit for declaration and for accounts:—

A suit for a declaration, that the plaintiff is a partner with the defendant and that, if the partnership be found subsisting, accounts might be taken, is governed by art. 120 and not by this article. 2 A.W.N. 87.

(3) Suit by member of joint Hindu family for account of a partnership:—

A suit by a brother of a Mitakshara joint Hindu family for an account and share of a business alleged to have been carried on by himself and another brother (the defendant) would be governed by this article, even though immoveable properties were comprised in the properties of the partnership, unless it could be held that the business was carried on as a joint family business or unless it could be held that portions of the assets of the partnership were withdrawn from time to time and converted into immoveable property to be owned by the partners as co-owners. Per Bhashyam Ayyengar, J. in 25 M. 149 (165)=11 M.L.J. 353.

(4) Registration of partnership deed does not save limitation:—

(a) A suit for an account of a partnership, dissolved more than three years before suit, is governed by this article and not by art. 116, even though the deed of partnership might have been registered. 22 M. 14=8 M.L.J. 151 (*disty.* 14 M. 465=1 M.L.J. 482). Compare 14 M. 465=1 M.L.J. 482 (noted next below).

(b) But, where a partnership agreement, stipulating for contribution towards losses in the business, has been registered, a suit by a partner against his co-partner to recover his share of the loss, based upon a settlement of accounts between the partners, is governed by art. 116 and not by art. 64 or this article. 14 M. 465=1 M.L.J. 482.

I.—‘Dissolved partnership.’

(1) Suit for accounts, maintainability of:—

Where a partnership is not dissolved, a suit for accounts is not maintainable. 9 A. 120.

(2) Suit for accounts of a subsisting partnership:—

No suit is maintainable, where a partnership is subsisting, against a co-partner for the profits, which had, up to a particular time, accrued but a suit can be brought for an account of the partnership. 16 W.R. 141.

(3) Suit by partner for contribution:—

Where a partner paid the amounts borrowed on pro-notes for partnership business, a suit by him for contribution against other partners is maintainable, notwithstanding that there was no adjustment of the accounts relating to the firm. 26 C. 254=3 C.W.N. 299.

(4) Suit by partner for money deposited in firm:—

Before a partner is enabled to recover money deposited by him as his share, the whole accounts of the firm ought to be taken and the ultimate liability of each partner should be ascertained. 21 W.R. 800.

1.—'Dissolved partnership.'—(concluded),

(5) **Suit for accounts of a partnership for a fixed term :—**

A suit for an account of a partnership entered into for a fixed term, where the business was not continued after expiry of such term, is governed by this article. 69 P.R. 1902.

(6) **Surviving partners carrying on business uninterruptedly :—**

Where a partnership is determined by death and the surviving partners continue to carry on the business, this article will be no bar to the taking of the accounts of the new partnership by going into the accounts of the old partnership, which have been carried on into the new partnership without interruption or settlement. 25 M. 26.

(7) **Suits by representatives of deceased partners :—**

(a) A suit may be brought by the representative of a deceased partner against the surviving partner of a firm to recover a share in a sum received by the surviving partner in respect of a partnership transaction, within the period of limitation, although a suit to take partnership accounts generally would be barred; and in such suit the defendant might deduct the amount, which might be found due to him on taking the partnership accounts, although a separate suit for such account might be barred by limitation. 6 B. 628.

(b) S. 17 of the Act will save, from limitation, a suit by the representative of a deceased partner for an account of the partnership business. 20 B. 15.

(c) A suit by the heir of a deceased partner against the surviving partner for an account and share of the deceased in the partnership assets, including the good-will and trade-marks of the partnership business, comes within the class of suits dealt with under this article. 9 C.W.N. 537.

(8) **Suit by the adopted son of a deceased partner :—**

Where the members of a joint Hindu (Jain) family constituted a trading firm and one of them died, a suit by the son, adopted by his widow, for dissolution of the partnership and for rendition of accounts, brought within six years from the date of adoption, was within time under arts. 126 or 127, the partnership not having been dissolved by the death of the deceased partner and no dissolution, between his death and the adoption, having been proved. 20 P.R. 1897.

(9) **Suit by Administrator-General for an infant :—**

Where, pending the minority of the heir of a deceased partner of a firm, Letters of Administration were granted to the Administrator-General, a suit by the latter for partnership account, during the minority of the infant, was not barred, since the suit was on behalf of the infant. 3 C.W.N. 186.

(10) **Burden of proof :—**

The defendant, who pleads limitation, under this article, to a suit for dissolution of a partnership and for an account, on the ground that the partners ceased to stand in partnership relation more than three years before suit, is not relieved of his obligation to substantiate his plea of limitation by merely showing that the firm had been declared insolvent more than three years before suit. 37 P.R. 1897.

General.

Jurisdiction:—

A suit for dissolution of a partnership can be tried by the ordinary Civil Courts.
7 A. 227.

(N.B.)—See, now, S. 265 of the Indian Contract Act IX of 1872 as amended by Act IV of 1886.

(Old Law).

- (1) A suit for an account of a partnership was governed by six years' limitation under clause 16, S. 1, Act XIV of 1859. 19 W.R. 277.
- (2) Where, in a partnership business, a statement and settlement of account was made, a suit based upon such settlement of accounts was governed by three years' rule under cl. 9, S. 1, Act XIV of 1859. 6 W.R. 328.
- (3) Where the dissolution of partnership was admitted, a suit for account and for plaintiff's share of the profits, was governed by cl. 16, S. 1, Act XIV of 1859. 7 W.R. 36.
- (4) Where, after a partnership business was over, the partners settled accounts between them and a balance was found due in favour of one of them, a suit by the latter to recover the balance was not governed by cl. 16, S. 1, Act XIV of 1859 but by cl. 9, S. 1, of the Act, since his claim was not a partnership demand. 18 W.R. 466.

107.—By the manager of a joint *Three years.* The date of the payment⁽¹⁾.
estate of an undivided family for contribution in respect of a payment made by him on account of the estate.

(Old Acts.)

[Art. 107 of Act IX of 1871.—Column 1—By a Hindu Manager of a joint estate for contribution in respect of a payment made by him on account of the estate. Columns 2 and 3—Same as above.

Act XIV of 1859:—No corresponding provision.]

1.—‘The date of payment.’

(1) Expenditure and not repayment cause of action:—

- (a) Where the manager of a joint Hindu family borrowed money on his personal security and spent it for purposes of family necessity, in a suit by him for contribution as against the other members, the period of limitation will be computed from the date on which he expended the money and not the date on which he repaid the loan and released his security. 20 C. 18.
- (b) The cause of action for a suit for contribution by the manager of a joint family arises on the date on which he made payment on account of the joint estate and not on the date on which he borrowed money to pay off the debt, originally contracted by him for such payment on account of the family. G.B.L.R. Ap. 108=12 W.R. 194.
- (c) Where a managing member of a joint Hindu family borrows money and spends for family purposes and then brings a suit against the other members of the family for contribution, having repaid the loan out of

1.—‘*The date of payment.*’—(concluded).

his private funds, his cause of action would arise on the date on which he originally expended the borrowed money on behalf of the family, and not on that on which he repaid the loan or gave a bond for the amount originally borrowed. 5 C. 321 & 20 C. 18.

- (d) But a suit for contribution against the co-parceners by the Manager of a Hindu family, who repaid the whole of a family-debt, is governed by art. 61, the cause of action arising when the money is actually repaid by him. 8 M.L.J. 271.

(2) **Suit by widow of a deceased member :—**

Where the widow of a member of a joint Hindu family was forced in execution of a decree to pay up more than her portion of the debts contracted for the benefit of the family, the cause of action for a suit by her to recover the excess arose not when the money borrowed was expended but when she was forced to pay up in execution. 6 B.L.R. Ap. 101=14 W.R. 480.

- 108.**—By the lessor for the value *Three years*. When the trees are cut of trees cut down by his down.
lessee contrary to the terms of the lease.

(Old Acts.)

[Art. 108 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Lessor's suit for value of trees cut :—

Where a lease was renewed, notwithstanding the fact that the lessee had cut trees contrary to the provisions of the lease, the limitation for a suit for the value of the trees cut ran from the breach of contract and not from the date on which the lessor came to know of it. 8 W.R.S.C. Ref. 9.

- 109.**—For the profits of immove-*Three years*⁽¹⁾. When the profits are able property belonging to the plaintiff which have been wrongfully received by the defendant⁽¹⁾.
received⁽³⁾, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal⁽⁴⁾, when he recovers possession.

(Old Acts).

[Art. 109 of Act IX of 1871.

For the profits of immoveable property belonging to the plaintiff wrongfully received by the defendant—Three years—When the profits are received, or where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, the date of the decree of the Appellate Court.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Receipt of rents immaterial:—

Under this article, a defendant is liable for the mesne profits received by him or which he might have, with due diligence, received during the three years before the date of suit and not before; and this period has no reference to the time when rents fall due. 24 C. 413 (*Distg.* 10 W.R. 486, 17 W.R. 208 and 22 W.R. 126).

(2) Suit by member of joint family:—

(a) A member of a joint Hindu family governed by the Mitakshara law cannot sue for a share of profits of the joint family estate, as he has no definite share until partition, nor can a claim for an account of the profits of the joint family estate be regarded as a claim for mesne profits. 14 I.A. 37 (P.C.) = 14 C. 493 (508).

(b) But where the shares are specific and definite, a suit for mesne profits may be instituted. 16 I.A. 71 (P.C.) = 16 C. 397 (413).

(3) Crop stealthily carried away by defendant:—

Where the defendant, while in possession of a certain land under a decree since reversed, carried away the crops of that land, a suit for the value of the crops so carried away is a suit "for profits of immoveable property belonging to the plaintiff wrongfully received by the defendant" within the meaning of this article. 4 C. 625.

(4) Misappropriation of paddy grown on plaintiff's land:—

Per Rampini, J.:—This article is inapplicable to a suit for damages for misappropriation of paddy grown on plaintiff's land. 22 C. 877.

(5) Presumption against claim:—

Where the mesne profits said to have been due, were not demanded for seven years preceding the date of suit, a presumption arose against such a claim. 7 W.R. 73 (P.C.) = 4 M.L.A. 431.

1.—'Wrongfully received by the defendant.'

(1) Lessee's claim for damages:—

Where the lessor prevents the lessee from taking possession of the property leased out to him and a suit by the lessee for mesne profits for the period during which he was out of possession is barred by this article, the lessee will be entitled to claim damages for breach of the lessor's obligation to put him in possession. 12 M.L.J. 249.

(2) Suit by usufructuary mortgagee kept out of possession:—

Where a usufructuary mortgagee is kept out of possession by the mortgagor, he is entitled to recover rents and profits received by the mortgagor during that period; but he can only recover profits received within three years of the commencement of his suit under this article. 2 Bom. L.R. 201

2.—‘ Three years.’**Profits for more than three years :—**

A claim for mesne profits during a period preceding the three years next before the filing of the plaint is barred by this article. 10 C. 785 (P.C.)—11 I.A. 88; 20 I.A. 155—21 C. 157 (P.C.); 14 M. 828—1 M.L.J. 171.

3.—‘ When the profits are received ’**(1) Date of receipt of profits :—**

The period of limitation prescribed in this article begins to run from the date on which profits have been received. 1 A.W.N. 13, 16.

(2) Mesne profits—Cause of action :—

The cause of action for a suit for mesne profits arises on each occasion of the receipt of the rent, or profit, by the defendant from plaintiff's land. 14 A.W.N. 48.

(3) Cause of action at end of year :—

In a suit for mesne profits, where the amount of mesne profits cannot be ascertained till after the end of the year, the cause of action does not arise till the end of the year. 10 W.R. 486.

(4) Rent falling due annually :—

Where the pottahs contained no specification of the amount of instalments or any provision for interest on arrears falling due within the year, in a suit by an auction-purchaser at a revenue sale to recover mesne profits, for the purposes of determining limitation, the rent must be taken to be one falling due annually. 22 W.R. 126; 7 W.R. 161.

(5) Provisional partition :—

Where the parties to a suit, which went up to the High Court, in pursuance of an agreement among them, provisionally took possession of certain portions of the land in dispute and one of them in the final rectification of the shares got more than he had held provisionally under the agreement, the limitation for a suit by him for the *wasilat* for such portion, began to run from the date on which the rightful partition was completed. 7 B.L.R. 113—15 W.R. 38 (P.C.)

4.—‘ Dispossessed by a decree afterwards set aside on appeal.’**(1) Restoration to possession under Privy Council Decree :—**

(a) Where a person is restored to possession under a decree of the Privy Council, cause of action for a suit by him for mesne profits during the period he was out of possession, would not arise before the decision of the Privy Council. 5 W.R. 125.

(b) Where a person was dispossessed of lands under a judgment of the Sudder Court, which was afterwards reversed on appeal by the Privy Council, the cause of action for a suit by him for mesne profits during the period he was out of possession began to run from the date of the judgment of the Privy Council. 2 N.W.P. 290.

4.—‘Dispossessed by a decree afterwards set aside on appeal.’—(concl.)

(2) Possession under decree confirmed on appeal :—

Where the decree of a lower Court for possession and future mesne profits was confirmed on appeal by the Privy Council, the three years mesne profits must be calculated from the date of the order of the Privy Council.

5. C.W.N. 52 (P.C.).

(3) Possession disturbed on appeal :—

This article does not apply to a case, where a person obtains possession under a decree which is afterwards set aside on appeal by the decree of a superior Court and is dispossessed, under the decree of the superior Court, by way of restitution ; to make the article applicable he must have been dispossessed by a decree afterwards set aside on appeal.
4 O.C. 355.

(Old Law).

(1) Suit for damages for obstruction to fish :—

A suit by a person, whose right to a fishery has been established, to recover damages from defendants for obstructing him from fishing is not one for damages for injury to personal property but for mesne profits and was governed by the six years' limitation under Act XIV of 1859. 17 W.R. 360.

(2) Limitation six years :—

Under Act XIV of 1859 a claim for mesne profits could be decreed for six years before institution of suit, the cause of action accruing from the date on which they became annually due. 3 W.R. 38 ; 5 W.R. 219 ; 6 W.R. 78 ; 6 W.R. 113 ; 7 W.R. 173 ; 17 W.R. 209 ; 1 W.R. 65 ; 83 ; and 3 W.R. 18.

(3) Commencement of cause of action :—

(a) In suits for mesne profits the cause of action arose from the date of dispossession. 3 W.R. 68.

(b) A suit to recover plaintiff's share of mesne profits from a co-sharer, who had received it on plaintiff's behalf but withheld payment to the plaintiff, was governed by six years' limitation under Act XIV of 1859. 22 W.R. 255.

(c) A suit for mesne profits instituted after Act XIV of 1859 came into force was governed by its provisions, though it was based on a decree for possession in a suit instituted before the Act came into force. 3 B.L.R. 81 = 12 W.R. 5.

(4) Suit by person restored to possession :—

Where the plaintiff was restored to the possession of property from which he was dispossessed by the defendant, the six years' mesne profits under Act XIV of 1859 was computed from the date of ouster by the defendant. 17 W.R. 208.

General.**(1) No necessity for suit for restitution :—**

No suit need be brought by a defendant for restitution, on a reversal in appeal, of an adverse decree, in his favour. He may seek restitution in execution of the decree. 13 B. 485; 21 C. 340 & 21 C. 989.

(2) Suit by co-sharer against lambardar :—

A suit by the plaintiff, a recorded co-sharer, against the lambardar and his co-sharers in a *mahal* for the recovery of his share in the profits of the *mahal* is governed by the three years' limitation contained in S. 94 of Act XII of 1881 (N.W.P.). 16 A. 333 (F.B.).

110.—For arrears of rent.⁽¹⁾ **Three years.** When the arrears become due.⁽²⁾

(Old Acts.)

[Art. 110 of Act IX of 1871.—Same as above.

S. 1, cl. 8 of Act XIV of 1859.—*To all suits for the rents of any buildings, or lands (other than summary suits before the Revenue authorities under Regulation, V, 1822, of the Madras Code)—Three years from the time the cause of action arose.*]

(Notes)**I.—‘Rent.’****(1) Suit by a superior holder against an inferior holder :—**

A——— is not one for ‘rent’ within the meaning of Act V of 1879 (Bombay Land Revenue Code). The word ‘rent’ is used in the Act only with reference to those superior and inferior holders between whom the relationship of landlord and tenant subsists. So, a suit by an Inamdar against a person who was not let into possession by the plaintiff or his predecessor in title under any agreement but who held lands in the village was held not to be one for ‘rent’ and not governed by this article but by art. 120. 25 B. 556—3 Bom. L.R. 135.

(2) Suit on a registered lease deed :—

(a) A suit for rent based upon a registered lease is governed by three years' limitation under this article and not under art. 116, since it is not a suit for compensation for breach of contract in writing registered. 26 A. 138 (dissenting from 15 C. 221).

But see next case.

(b) A suit for arrears of rent based upon a registered lease is not governed by this article but is governed by article 116. 4 P.R. 1902.

(3) First crop assessment made over by Government :—

Where the Government having directed certain ryotwari tenants to pay the first crop assessment of certain lands to the trustees of a religious institution instead of to the Government and the trustees sued the ryots for recovery of arrears personally against the ryots and as a charge on

1.—'Rent.'—(concluded),

the lands, the suit was held not to be one for 'rent' and was governed, for purposes of limitation, by art. 120 and not by this article. 26 M. 730=13 M.L.J. 248.

(4) Hire of water :—

A suit for hire of water is not a suit for rent within the meaning of this article. 171 P.R. 1883.

(5) Merais or customary dues :—

A suit to recover *merais* or customary dues payable on account of a Chatram is governed by art. 120 and not by this article as *merai* is not 'rent' and the claim does not arise out of a relationship of land-lord and tenant. 16 M. 305.

(6) Road-cess :—

The word 'rent' in S. 65 of the Bengal Tenancy Act includes road-cess payable to the landlord by the tenant. 21 C. 722.

(7) Dak cess :—

Where *dak*-cess is claimed under the contract by which rent is payable, it must be regarded as rent (i. e.) as part of what is lawfully payable in money for use and occupation of the land held by the tenant. 21 C. 132.

(8) Suit for use and occupation :—

Where a lessor all along received rent from the ostensible lessees and, when the tenure was sold in execution of a decree to a third person, the lessor was not able to recover rent from them any longer, a suit, by the lessor against the beneficial lessees, not being one for rent but one for compensation for the use and occupancy of the lands demised, was governed by six years' limitation under cl. 16, S. 1, Act XIV of 1859. 18 W.R. 132.

Similarly a suit to make the defendant liable for compensation in the shape of rent for the land which he held in the name of his servant. 16 W.R. 287.

(9) Suit for rent for stacking timber :—

Where the defendant made use of plaintiff's land by stacking timber thereon, a suit to recover money due or payment in kind for such use, was of the nature of one for 'rent' governed by the law of limitation applicable to money claims of that kind. 21 W.R. 124.

(10) Suit by mortgagee-lessor against mortgagor-lessee :—

Where the holder of a *kanom* or a usufructuary mortgagee leases the land to the mortgagor under an independent deed of lease, the former's claim for arrears of rent is governed by this article. 3 M. 57.

(11) Suit strictly not for arrears :—

Where a suit for rent of land was not a suit for arrears of rent within the meaning of s. 29, Act VIII of 1869 (i.e.) such a suit for arrears of rent as the Collector could have entertained under Bengal Act X of 1859, held, the suit, for purposes of limitation, was governed by the provisions of Act XIV of 1859 and not by Act VIII of 1869 (Bengal). 16 B.L.R. 56=23 W.R. 152.

2.—‘When the arrears become due.’

(1) When rent falls due :—

Though, in most cases, the point of time at which rent becomes due is the close of the [period in respect of which it is to be paid, still legislation or custom or express contract or the special circumstances of any case may make rent become due at some other time. The falling due of rent means the falling due of an ascertained rent, which the tenant is under an obligation to pay, and which the land-lord can claim and, if necessary, sue for. 14 M.L.J. 1=6 Bom. L.R. 241=8 C.W.N. 162 =27 M. 143 (P.C.)

(2) Arrear of rent—Bengali year :—

A suit for arrears of rent brought more than three years from the last day of the Bengali year in which the arrears fell due was barred by limitation. 23 C. 191.

(3) Suit by Zemindar against assignee of putnidar :—

Where a Zemindar failed to realize the whole amount due under a decree for rent against the auction-purchaser of a *putni* tenure, a suit by him against the assignee of the *putnidar*, who was in possession to recover the unrealized portion of the decree amount, was barred, inasmuch as it was brought more than three years after the arrears became due, whether the Bengal Act VIII of 1869 was held applicable or whether this article was held applicable. 5 C.L.R. 62 (*distinguishing* 18 W.R. 132).

Suits under Special & Local Acts.

(Bengal Acts).

(1) Rent suits under Bengal Act VIII of 1885 (Tenancy) :—

(a) There is one period of limitation prescribed for all rent suits under the Bengal Tenancy Act, whatever the form of the lease may be or whether the lease is registered or not. 17 C. 469 (*distinguishing* 15 C. 221 & 3 M. 76).

(b) See also, 19 C. 1 (F. B.), where a rent suit, based on a registered lease, has been held to be governed by the Tenancy Act. But, if the registered lease be for building purposes and for establishing a coal depot, the Tenancy Act would not apply, the lease not being one for agricultural or horticultural purposes. 19 C. 499.

(2) Ryot, definition of :—

The term ‘ryot’ in the Bengal Tenancy Act (VIII of 1885) does not exclude a person, who has taken land for horticultural purposes. 21 C. 129.

(3) Suit by landlord against putnidar :—

Where a *putnidar*, who had been dispossessed by the landlord, obtained possession and merne profits for the period he was out of possession through Court, a suit by the landlord for rent, for a period more than three

Suits under Special & Local Acts.—(concluded).

years from the date on which the arrears fell due was barred by limitation, though the suit was instituted within three years from the date of delivery of possession to the *putnidar*. 23 C. 205.

(4) Rent at excess rate:—

A suit for——— as per decree of Court is governed by art. 2 (b), Pt. I, Sch. iii of the Bengal Tenancy Act (VIII of 1885). 17 C. 251.

(5) Suit by assignee of arrears:—

A suit by an assignee of arrears of rent from a landlord is not governed by art. 2 of Part I of Sch. iii of Act VIII of 1885 (Bengal Tenancy) but by this article. 4 C.W.N. 605.

Act VIII of 1869 (Bengal.)

The last day of the third year from the close of the year in which the rent becomes payable is the last day on which a suit for arrears of rent must be brought under S. 29, Bengal Act VIII of 1869. 6 C. 325=7 C.L.R. 342 (F.B.), *overruling* 5 C. 713=6 C.L.R. 49.

Act X of 1859 (Bengal.)

(1) Suit in Collector's Court:—

The limitation applicable to a suit for rent brought in the Collector's Court, under this Act, was that provided by S. 32 of the Act and not that provided by Act XIV of 1859, the special provisions of the Rent Act not having been repealed by the general Limitation Act. 15 B.L.R. 60 (Note)=19 W.R. 5.

(2) Suits for rent —Act X of 1859 (Bengal):—

Suits for arrears of rent under this Act were not affected by Act XIV of 1859. 2 W.R., Act X Rulings, 21.

(3) Suit for arrears at enhanced rate:—

A suit for arrears of rent at an enhanced rate after notice may be brought without getting a decree establishing the plaintiff's right to enhance. 6 W.R., Act X Rulings, 77.

Reg. II of 1805 (Bengal)

Non-payment of rent for sixty years:—

Under cl. 3, S. 3, of the Regulation, a suit for rent was barred against a person, who could show peaceable possession, without payment of rent, for more than 60 years. 5 W.R. 1 (P.C).

Commencement of time:—

- (1) In a suit for arrears of rent, the three years' limitation was reckoned not from the dates of instalments, but from the last day of the year, in which the arrear became due. 3 B.L.R. Ap. 72=11 W.R. 537.
- (2) Where the sale of a *putni* for arrears of rent was set aside on the ground of irregularity and the *putnidar* was put in possession thereof, the cause of action for a suit by the Zemindar to recover the arrears of rent, for which the *putnee* was sold, must be taken to have accrued when the possession was restored. 11 W.R. 5 (P.C).

Suits under Rent Recovery Act VIII of 1865 (Madras)**(1) Suit for rent after tender of registered pattah :—**

A suit for rent after tender of a registered pattah, under this Act, but refused by the tenant, is not governed by art. 116 but by this article. 13 M.L.J. 485.

(2) Commencement of limitation :—

(a) In a suit for arrears of rent due under a decree under S. 10 of the Act, the period of limitation in this article commences from the date of the decree. 17 M. 225 = 4 M.L.J. 5.

(b) In a suit for rent, the cause of action, with reference to limitation, accrues on the date on which the rent is payable by custom or contract, irrespective of whether pattah has been tendered or a suit to enforce acceptance of pattah under the Act is pending. 22 M. 248.

(c) See, also, 14 M.L.J. 1 (P.C.) under Heading No. 2, *supra*.

General.**Whether suits for rent can be saved from limitation :—**

Where a Zemindar brought a suit for arrears of rent against the assignees of his *putni* lessee, not upon the basis of the *putni* lease but for use and occupation, treating the tenants as mere trespassers and the suit was dismissed, a subsequent suit by him against the tenants for rent of the same year, brought more than three years after the last day of the year in which the arrears became due, was held barred, the pendency of the previous suit not saving limitation. 3 C. 6 [*distinguishing* 12 M.I.A. 244 = 2 B.L.R. 10 (P.C.)]

Nor will the pendency of a suit for enhancement of rent save limitation. 3 C. 791. Nor will a suit for *khas* possession instituted by mistake; 3 C. 817; nor will a suit for setting aside a *putni* and for recovery of *khas* possession; 12 C. 258; 17 C. 251; nor will the pendency of a suit for ejectment; 9 C. 255 = 12 C.L.R. 129 (P.C.) = 9 I.A. 82; nor will the pendency of a suit to enforce acceptance of a pattah under Madras Rent Recovery Act VIII of 1865; 22 M. 248 & 22 M. 249 (Note).

But see 8 C.W.N. 1 (P.C.), where it was held that the pendency of a suit for enhancement of rent brought within three years after the date on which the rent became due saved a suit for rent from limitation.

See, also, 14 M.L.J. 1 = 27 M. 143 (P.C.), (*approving* 17 M. 225 and *overruling* 19 M. 21), where it was held that the pendency of a suit for enforcing acceptance of pattah does save a suit for rent from limitation.

(1) Suit by intermediate land-lord against lessee :—

Where a lessee fails to pay rent to the superior land-lord as covenanted for in the lease deed, the immediate land-lord is entitled to recover, from the lessee, substantial damages for breach of the contract to pay rent to the superior land-lord. 11 C. 221.

(2) Jurisdiction of S. C. Courts :—

(a) A suit by an assignee of arrears of rent, after they fell due, to recover the sum due, is a suit for 'rent' and as such not cognizable by a Court of Small Causes. 27 C. 827 = 4 C.W.N. 357 (F.B.)

General—(concluded).

- (b) Compare 26 C. 338, where the assignee from a tenant was, under the terms of the assignment, held not liable to the land-lord for compensation for the use and occupation of the premises after the determination of the lease, because there is no express tenancy between the plaintiff and the assignee from the tenant.

(3) Burden of proof:—

Where, in answer to a suit for rent, the defendant pleads limitation, the plaintiff must call evidence to show that the suit is in time and he will not be allowed to remedy the defect in second appeal. 8 M.L.J. 201. 22 M. 250 (Note).

(Old Law.)

Lessee's covenant to pay a creditor—Lessor's cause of action:—

Where a lessor covenanted with his lessee that the latter should, out of the rents due, make certain payments to the creditor of the lessor and the creditor, who was not fully paid, brought a suit and obtained a decree against the lessor for the balance still due, the cause of action for a suit by the lessor against the lessee arose from the date of the latter's breach of contract. 10 W.R. 80.

A suit for arrears of rent was governed by three years' limitation provided in S. 1, cl. 8 of Act XIV of 1859. 7 M.H.C. 242.

- 111.—**By a vendor of immoveable *Three years.* The time fixed for property to enforce his lien⁽¹⁾ for unpaid purchase-money. completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.

(Old Acts.)

[Art. 111 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—'To enforce his lien.'

(1) Suit to enforce lien against property:—

- (a) A suit by a vendor of immoveable property to enforce, against the property, his lien for the unpaid purchase-money under S. 55, Sub. S. 4 (b), of the Transfer of Property Act, 1882, falls under art. 132. 21 A. 454 (following 18 B. 48 and 22 B. 846 and dissenting from 21 M. 141=7 M.L.J. 275).
- (b) Unpaid purchase-money is a charge on the property in the hands of the vendee, and a suit to enforce it falls under art. 132. 18 B. 48; see, also, 22 B. 846.

I.—'To enforce his lien.'—(continued).

- (c) But a suit to enforce the vendor's lien for unpaid purchase-money is governed by this article and not by art. 132 whether the lien is sought to be enforced personally against the vendee or against the property sold. 21 M. 141; 7 M.L.J. 275; 10 M.L.J. 349 and 24 M. 233.
- (d) In 24 M. 233, the sale-deed, which was registered, stated that the purchase-money had been paid though, in fact, it had not been. It was held that art. 116 was not applicable to the suit.
- (e) Where, however, a sale-deed, which is registered, contains the contract of sale, which preceded the actual sale and contains a recital to the effect that the price had been paid, though, in fact, it had not been paid, the registered deed of sale was held to be a contract notwithstanding the fact that the vendee did not sign the deed and the suit for recovery of unpaid purchase-money was held to be governed by art. 116. 25 M. 55.
- (f) It is permissible for the contracting parties to enter into a collateral arrangement as to the payment of the purchase-money, though the deed recites that it had been paid. 22 A. 370 (P.C.) = 27 I.A. 93.

(2) Payment of part of purchase-money :—

From the moment the purchaser pays a part of the purchase-money, he has a lien on the property to that extent, which lien can be lost to him only by reason of his failing to carry out his part of the contract. 23 B. 56.

(3) Personal remedy :—

Suit to recover unpaid purchase-money from the vendee personally is governed by this article. 22 B. 846.

(4) Difference between a statutory charge and a charge of a Court of Equity :—

A charge, which an unpaid vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendee's lien given by a Court of Equity. The former is a statutory charge and can be excluded only by a contract; whereas the latter can be modified to suit the circumstances of the case by a Court of Equity. 31 C. 57 (72) = 8 C.W.N. 41 (P.C.).

Compare 7 A. 502, (P.C.) noted under art. 65.

(5) Vendor's remedy where he has given possession :—

A vendor of immoveable property, who has given possession to the purchaser, is not entitled to have the contract of sale rescinded and get back the property, because the consideration is not paid. His only relief is to sue for the money and he has a lien on the property. 3 B. 172.

(6) Right of vendor's creditor to enforce the lien :—

Though there is a lien on the property for unpaid purchase-money, in the case of an unpaid vendor, the vendor's creditor is not entitled to enforce that lien. 11 C.L.R. 339.

1.—‘To enforce his lien.’—(concluded).

(7) Vendor's defence to an action by vendee:—

Where the vendor is, notwithstanding the sale, in possession, and the vendee sues to recover possession at a time when the vendor's title to sue for unpaid purchase-money might have been barred under this article, the vendor may retain possession and refuse to deliver it up unless and until the unpaid purchase-money is paid up; because, though the remedy of the vendor to recover the purchase-money might have been barred, his right might not have been extinguished. 27 M. 28.

112.—For a call by a Company⁽¹⁾ **Three years.** When the call is payable.
registered under any Statute
or Act.

(Old Acts.)

[Art. 112 of Act IX of 1871.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

1.—‘For a call by a Company.’

Suits by Company and those by Liquidator:—

Suits by a registered Company against a share-holder for the amount of calls on the shares taken by him are governed by this article; but suits by the Liquidator, after winding up, are governed by art. 120. 160 P.L.R. 1909; 10 B. 483 (487).

Suit by liquidator against share-holder:—

A suit by a liquidator against a share-holder for the amount due in respect of his shares must be brought within three years from the date his name is entered in the register as a share-holder, the debt not being recoverable until he is registered as a share-holder. 17 B. 469 and 472.

Liability of share-holders:—

Share-holders are liable to contribute, not only in respect of calls made before the winding up, but also in respect of unpaid calls made before the date of the winding up, whether barred by limitation at that date or not. (See S. 61 of Act VI of 1882). 20 B. 654.

113.—For specific performance **Three years.** The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice⁽²⁾ that performance is refused.
of a contract.⁽¹⁾

(Old Acts.)

[S. 113 of Act IX of 1871.—1st & 2nd Cols.—same as above. 3rd Col.—when the plaintiff has notice that his right is denied.

Act XIV of 1859.—No corresponding provision, the provision approaching nearest being that contained in cl. 9 of S. 1.]

(Notes)

1.—'Specific performance of a contract.'

A.—Suits based on awards:—

(1) SUIT TO ENFORCE AWARD:—

(a) A ——— is not a suit to enforce a contract within the meaning of this Act, the word 'contract' in this article being used in its ordinary sense. Art. 144 is applicable to such a case. 23 M. 593—10 M.L. J. 208.

(b) A ——— is not a suit for specific performance of contract falling under this article; an award not being a contract but a decision of a tribunal constituted by the parties. 23 A. 285; 23 M. 593. But see 16 A. 3 under No. 5 *infra*.

(c) A ——— is not governed by this article. 7 O.C. 369.

(d) A ——— may be brought within the three years provided by this article, an award being a contract. U.B.R. (1897-1901), 293 (295).

(e) See also, *Ibid*, p. 481 (486) where it is held that an award may be viewed as a contract by virtue of S. 30 of the Specific Relief Act.

(2) SUIT BETWEEN PARTIES TO AN AWARD:—

An award declared that, in accordance with an agreement between the parties, they should transfer the one to the other, different portions of the property which was the subject of dispute. A suit by one of the parties for the recovery of the property agreed to be transferred to him held governed by this article and not by art. 144. 26 A. 497.

(3) SUIT FOR LAND, BASED ON AN AWARD:—

A suit for recovery of land assigned by an award to one of the parties is not governed by this article but by art. 144. 2 U.B.R. (1897-1901), 446.

(4) SUIT TO FILE AMENDED AWARD:—

Where, in the course of proceedings to enforce an award under S. 525, C.P.C., the Court, finding the award to be vague, remitted it to the arbitrators for reconsideration, and the Chief Court refused to file the amended award, on the ground that the award was vague and the lower Court had no power to remit it for reconsideration, the cause of action for a subsequent suit based upon the amended award was the same as the cause of action for the application to enforce the original award, and the suit being in time from the date of the amended award, was not barred. 67 P.R. 1889.

(5) SUIT FOR MONEY DUE UNDER AWARD:—

A suit for recovery of a sum of money made payable, under an award by one party thereto to another, is governed by this article, for purposes of limitation, read with S. 30 of the Specific Relief Act. 16 A. 3—13 A. W.N. 179; see also 5 A. 263—3 A.W.N. 16. But see and compare 23 A. 285 and 23 M. 593 under No. 1 *supra*.

(6) CREDITOR HAS NO FRESH CAUSE OF ACTION ON AWARD:—

An award on an arbitration providing that a certain specified debt due by the deceased should be paid by certain persons amongst the heirs, will not give the creditor a fresh cause of action, but at most a fresh starting point for limitation. 17 A.W.N. 144.

1.—‘*Specific performance of a contract.*’—(continued).

B.—Suit to enforce partition-arrangement :—

Where, in a partition-proceeding between co-sharers in a village, it was agreed that, if a grove of one co-sharer was allotted to another co-sharer, the first co-sharer should give the other co-sharer land to the extent of the grove, a suit by way of compensation, for land to the extent of the grove allotted to one of them, was held governed by this article, the cause of action arising when the plaintiff had notice that the defendant refused specific performance. 5 O.C. 140.

C.—Suit based on a compromise :—

This article did not apply to a suit to recover possession of land, where the claim was based on a compromise effected in the course of a previous litigation between the parties, but art. 145 (144) applied since the suit was for ‘*immoveable property.*’ 25 W.R. 521.

D.—Suits based on sales :—

- (a) A suit to have ‘*a sale-deed executed and completed*’ and for possession of the property, is governed by this article, and not art. 144, it being essentially one for specific performance and the right to possession springing out of the contract of sale. 6 A. 231=4 A.W.N. 42.
- (b) This article is inapplicable to a suit by a vendee of immoveable property, (who has not paid part of the consideration), to assert his proprietary right in the estate making the *dakhil kharij* resistance his cause of action. 6 A.W.N. 96.
- (c) At the date of a sale, the vendor had not been in possession but his title to possession had been adjudged by a decree, which was then under appeal. The sale-deed did not contain any agreement on his part to deliver possession. A suit by the vendee for possession, after the vendor obtained possession, held governed by art. 136 or 144, and not by this article. 2 A. 718.

E.—Suit to enforce execution of a kabuliya :—

Where a suit for *khas* possession by the plaintiff was compromised and dismissed, on the defendant undertaking to execute a *kabuliya* to plaintiff for a term of ten years and a subsequent suit by the plaintiff for ejection also failed, the present suit for specific performance of the contract to execute the *kabuliya* brought within three years from the date of refusal to execute it was not barred. 6 O.W.N. 95 (short notes).

F.—Suit for specific performance of agreement to grant pattah :—

A suit for specific performance of an agreement to grant a pattah when required, would be in time, if brought within three years from the time when the plaintiffs had notice that their right was denied. 5 C. 175=2 C. L.R. 268.

1.—‘Specific performance of a contract.’— (continued).

G.—Suits based on Mortgages:—

(1) SUIT BY MORTGAGEE FOR POSSESSION:—

- (a) A——of the mortgaged property based on a covenant in the mortgage-deed to the effect that he should take possession in case the mortgage-money was not paid by a certain date, *held* not governed by this article, but by article 135. 96 P.R. 1890.
- (b) Similarly, where, notwithstanding the recital in a deed of mortgage that possession had been given to the mortgagee from the date of the deed, possession was not actually given, a suit by the mortgagee for possession of the property mortgaged is not governed by this article, but by art. 135. 134 P.R. 1883.
- (c) A——, where the mortgagor having agreed to put the former in possession subsequently sold it to a third person, was, though a suit within this article, none the less one under art. 135 and *held* governed by the twelve years’ limitation. 4 A.W.N. 123.

(2) SUIT FOR BALANCE OF MORTGAGE-MONEY:—

- Suit by the mortgagor against the mortgagee for balance of the mortgage-money due from the latter to the former as consideration for the mortgage is not governed by this article. 13 A. 200.

H.—Suits based on leases:—

(1) SUIT BY ASSIGNEE OF LESSEE FOR SPECIFIC PERFORMANCE:—

See 5 C. 932=7 I.A. 107 (P.C.), as to the right of the assignees of a lessee to bring a suit against the lessor for specific performance.

(2) RIGHT OF LESSEE’S REPRESENTATIVES TO SUE FOR SPECIFIC PERFORMANCE:—

Where the grant of a lease was made in consideration of the grantee’s conducting a suit, the right to enforce specific performance will cease to exist under S. 23, Specific Relief Act, upon the death of the grantee, without performing his part of the contract, the personal quality of the grantee being a material ingredient in the contract. The right will also be lost by reason of the delay and laches of the grantee and his successors. 7 C.W.N. 229.

I.—Suit by party to an exchange:—

A suit for the recovery of equivalent land by a party to an exchange, who was dispossessed from a portion of the lands he got on exchange, the suit being based on a covenant in the deed of exchange for making good lands lost by dispossession, is governed by this article, the cause of action accruing from the date of eviction. 11 A. 27 (F.B.)=8 A.W.N. 254; 9 M.L.J. 137.

J.—Claim based on equitable principles:—

Where an uncle and nephew contributed their earnings to a common fund in pursuance of an agreement between them to do so, a suit by the nephew to recover his share in the fund so accumulated is not governed by this article but by art. 120, since the claim is one to be dealt with on equitable principles and apart from any question of contract. 23 M. 583.

1.—‘Specific performance of a contract.’—(concluded).

K.—Agreement not a trust:—

A transaction not amounting to a trust at all, nor to a ‘trust for any specific purpose,’ but to an agreement capable of being specifically enforced, would be governed by this article. 2 C. 323.

2.—‘When the plaintiff has notice.....refused.’

(1) Mortgagee's right to enforce right of pre-emption:—

Where certain property was mortgaged with a right of pre-emption in favour of the mortgagee, and the mortgagor, notwithstanding, assigned the equity of redemption to a third person, the cause of action for a suit by the mortgagee to enforce his right of pre-emption arose when the right of pre-emption was infringed by the assignment of the equity of redemption. *Per Bhashyam Aiyangar, J.*, in 24 M. 449.

(2) When cause of action arises:—

In a suit for specific performance, no cause of action arises until demand. 3 M. 87 (*distinguishing* 7 M.H.C. 219).

General.

(1) Suit for possession on sale deed being executed:—

Where a suit for specific performance of a contract of sale was decreed in favour of the plaintiff in the suit and owing to the failure of the defendant the Court executed a sale deed, a suit by the same plaintiff to recover possession of the property on the strength of the deed of sale was not barred by the provisions of S. 43, C.P.C. 18 B. 537.

Such a suit is barred by S. 43, C.P.C. 22 M. 21.

(2) Plea of delay in second appeal:—

Where an objection as to the delay in bringing a suit for specific performance was not taken up in the lower Courts, such objection will not be entertained in second appeal. 10 C. 1061.

(3) Suit by creditor against debtor on sale falling through—Limitation:—

A suit by a creditor, who accepted a debt, originally, as consideration for a sale, for recovery of the debt on failure of the sale, would begin to run from the date when the original debt became due, and not from the date of the failure of the contract of sale. 8 A. 214.

(4) Second suit for deposit on dismissal of first suit for specific performance:—

A second suit for return of the deposit money, the first suit for specific performance of a contract having failed, is governed by the three years' limitation, time beginning to run from the date of the first suit. 8 M. 11 J. 61.

(Old Law.)

Where the plaintiff and the principal defendant entered into a contract, whereby the latter undertook to admit the former to a share of the property of his adoptive father, a suit by the plaintiff for specific performance of the contract was governed by cl. 9, S. 1, Act XIV of 1869. 12 W.R. 22.

- 114.**—For the rescission of a contract. *Three years.* When the facts entitling the plaintiff to have the contract rescinded first become known to him.

(Old Acts.)

[Art. 113 of Act IX of 1871.—Cols. 1 & 2—same as above. Col. 3 :—When the contract is executed by the plaintiff.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) **Suits by third parties :—**

This article obviously refers to the rescission of contracts as between promisors and promisees, and not to suits by third parties to have an instrument cancelled or set aside. 3 A. 846 (848),—1 A.W.N. 95.

(2) **Suit by a reversioner :—**

A suit by a reversioner to recover an occupancy tenure on the death of a widow from a defendant who sets up a purchase from the widow, does not fall under this article, the object of the suit not being a rescission of the contract. The article applicable is 141. 141 P.R. 1882.

1.—‘ For the rescission of a contract.’

(1) **Rectification of instrument :—**

A suit for the ——— is not governed by this article. See *Mitra's Limitation*, p. 985.

(2) **Rectification of a deed of trust :—**

A suit against the administrator, with the will annexed, of a deceased testator for the rectification of a deed of trust on the ground that it did not conform to the provisions of the will under which a charity was established, is governed by art. 120, and not by this article. See 18 B. 551 (at p. 562) cited in *Mitra's Limitation* at p. 935.

(3) **Award of a Yawgaung :—**

The essential condition necessary for the application of this article is that there is a contract between the parties which can be rescinded. An award by a *Yawgaung* is not such a contract. 2 U.B.R. (1892-1896), 475 (478).

(4) **Suit for property covered by an award :—**

The limitation for a suit to recover possession of certain property covered by an award brought about by coercion and undue influence, which award dispossessed plaintiff, would be three years, whether the award be treated as a contract under this article or as a decree, under art. 95, or as an instrument not otherwise provided for under art. 91. 2 U.B.R. (1892-1896), 475.

General.

Defendant not affected :—

The defendant, who is not suing to rescind a contract but who is only defending an action on the ground of misrepresentation, will not be affected by this article. 4 C.W.N. 369 (388).

115.—For compensation for the breach of any contract, express or implied⁽¹⁾ not in writing registered,⁽²⁾ and not herein specially provided for.⁽³⁾ *Three years.* When the contract is broken⁽⁴⁾ or (where there are successive breaches)⁽⁵⁾ when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing)⁽⁶⁾ when it ceases.

(Old Acts.)

[Art. 115 of Act IX of 1871. For the breach of any contract, express or implied, not in writing registered, and not herein specially provided for —Three years—When the contract is broken, or (where there are successive breaches) when the breach sued for occurs, or (where the breach is continuing) when it ceases.

S. 1, cl. 9, of Act XIV of 1859. * * * * *
or for the breach of any contract—the period of three years from the time when the debt became due or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent or interest or a contract in writing signed by the party to be bound thereby or by his duly authorized agent.]

(Notes)

1.—‘Breach of contract express or implied.’

(1) Suit for money due for supply of stores :—

A suit for the recovery of money due from the defendant for the purchase of stores &c., would be barred, if brought more than three years after the termination of the plaintiff's agency or after the last supply by the plaintiff as purchasing agent, if this article is held to apply. 14 C. 256.

(2) Suit by lessor against lessee :—

Where, in pursuance of an agreement between lessor and lessee, the latter was to pay every year out of the rent due to the lessor a certain sum to the lessor's creditor, and the lessee made certain payments only, the cause of action for a suit by the lessor to recover from the lessee the balance of the debt still due to his creditor accrued on the date on which the defendant failed to pay. 10 W.R. 80.

1.—'Breach of contract express or implied.'—(continued).

(3) **Contract to deliver up factories and indigo :—**

Where, on a lease of certain indigo factories being set aside, the lessees agreed to give up the factories and the indigo manufactured by them on condition of their deposit being returned to them, a suit to recover from them the factories and indigo was a suit for damages for breach of contract to deliver them up. 9 W.R. 367.

(4) **Contract by partners :—**

Where the working partners of a firm undertook to be liable for any outstandings in respect of goods sold on credit, the sale of goods on credit by them was not a breach of contract. 19 W.R. 277.

(5) **Suit for damages—No express contract :—**

Where the plaintiff repaired the defendant's bungalow and there was no contract as to the amount to be paid for the repairs, a suit by the plaintiff to recover the repair-charges was held governed by the six years' limitation. 9 Bom. H.C.A.C. 280.

(6) **Suit for damages for defendant's marrying plaintiff's deceased brother's widow :—**

Plaintiff's suit for damages in consequence of the defendant's having married his (plaintiff's) deceased brother's widow, being based on a well-recognized custom in the community to which the parties belonged, to pay the expenses incurred by the widow's deceased husband's family, is governed by this article. 3 A. 385 = 1 A.W.N. 7.

(7) **Loss of goods sent by Railway :—**

A suit against a Railway Company for loss of goods, where there is no contract, is governed by art. 30, since the claim is based, not upon contract, but upon an alleged negligence or want of proper care on the part of the defendant. 3 M. 240.

(N.B.)—In this case the defendant Company was different from the one to whom the goods were consigned for carriage. Cf. Nos. 1 to 4 under Heading 3, at p. 884 *infra*.

(8) **Damages—Post diem interest :—**

Case in which the Privy Council held that, where a deed of mortgage does not expressly provide for payment of interest after the date fixed for payment of the principal, the mortgagee will be entitled to interest by way of damages as long as the principal remains unpaid, there being a breach of contract during the period of non-payment of the principal, and that such damages may be recovered for six years prior to suit. 19 A. 89 = 23 I.A. 138 (P.C.).

(9) **Breach of contract to supply kankar :—**

A suit to recover the difference between the sums advanced on a written contract for the supply of *kankar* and the value of the *kankar* supplied, is governed by this article. 22 P.R. 1883.

(10) **Suit to recover water-rate as per contract :—**

Where the defendant agreed to pay plaintiff water-rate at a specified sum per acre, a suit to recover the sum due is governed by this article. 171 P. R. 1883.

1.—‘Breach of contract express or implied.’—(concluded).

(11) Suit for money paid out of Court to judgment-creditor :—

A suit to recover amount paid out of Court in execution of a decree by the judgment-debtor, and which was not given credit to by the judgment-creditor, is governed either by art. 97 or by this article. 79 P.R. 1892.

(12) Deposit of Government securities :—

Where certain Government securities were made over to a certain person for being kept in deposit, with power to raise loan upon them, on condition of their being taken back when required, a suit for a recovery of them or their money value is either governed by art. 49, or art. 120, or by this article. *Per* Hill, J.—Such a suit is one falling under art. 145. 31 C. 519 38 C.W.N. 500.

(13) Contract to cut and remove trees :—

Where a Military Officer, invested with the powers of a Forest Officer, entered into a contract with the plaintiff, whereby the latter was empowered to cut down and remove, for his benefit, the forest trees, and the contract was brought to an end by an order of the General Officer Commanding, a suit by the plaintiff for damages for breach of contract, brought within three years from the termination of the period of contract, was in time. 16 P.R. 1899.

(14) Suit against agent :—

A suit against a *del-credere* agent on a balance of accounts, where there was no express written contract, was *held* governed by S. 1, cl. 9 of Act XIV of 1859. 16 W.R. 35 (P.C.) = 10 B.L.R. 15.

(15) Suit against representatives of a deceased agent :—

A ——— for accounts is governed either by art. 62 or art. 120 and not by this article. 96 P.R. 1886.

(16) Suit for land based on compromise :—

A ——— is a suit for immoveable property and not one based on a contract or for a breach thereof, and was governed by cl. 12, S. 1 of Act XIV of 1859. 13 B.L.R. 312 = 1 I.A. 157 (P.C.).

2.—‘Not in writing registered.’

(1) Suit to recover money on oral agreement :—

A suit to recover money, lent upon a verbal agreement that the loan should be repaid at a specified date, is governed by this article. 10 C. 1093 ; 15 M. 380 = 2 M.L.J. 42.

(2) Conditions not expressly entered in registered deed :—

Where a contract of sale is in writing and registered, all the terms, which the law implies or reads as part of the contract, must also be regarded as part of the registered writing, and a suit for compensation for breach of such terms will be governed by art. 116 and not by this article. 21 M. 8.

(3) Breach of contract contained in unregistered receipt :—

A suit for compensation for breach of contract contained in an unregistered receipt will be governed by this article. 11 M.L.J. 318.

3.—‘Not herein specially provided for.’

(1) Damages for non-delivery of goods against Railway Company:—

A suit for damages for non-delivery of goods is governed by art. 81 and not by this article, because such a case is specially provided for by art. 81.
4 Bom. L.R. 447.

But see 5 M. 888 (next case).

(2) Suit for non-delivery of goods:—

This article is applicable to a suit against a Railway Company by the consignee of goods (not sent on sample or for approval) for compensation for non-delivery, as the consignor contracts with the Company as agent for the consignee, and the property in the goods passes to the consignee on delivery to the Company. 5 M. 888.

(3) Loss of coin sent by Railway:—

Where a box, containing rupees sent uninsured by a Railway, was lost in the transit, a suit to recover the amount so lost was held governed by art. 90, and not by this article. 19 B. 165.

(4) Suit against owner of ship for short delivery:—

A suit against the owners of a fleet of steamships, for compensation for value of goods short delivered, is a suit for breach of contract to deliver, and is governed by this article. 3 M. 107.

Compare the above cases with No. 7 at p. 882, *supra*.

4.—‘When the Contract is broken.’

(1) When cause of action arises:—

(a) A refusal to perform the contract is necessary to give the plaintiff a right to sue for compensation for breach of contract. 19 M. 391.

(b) Where the intention of the parties to a contract appears to be that payment of money should not be made by one party to the other until required by the latter for the purpose for which it is destined, limitation begins to run only from the date of demand. 20 B. 8.

(c) Where, after accounts had been stated between the plaintiff and defendant, the latter agreed to pay the former the amount found due, and there was consideration for the contract, a suit to recover the amount so agreed to be paid must be brought within three years from the date of breach of contract. 20 P.R. 1883.

(2) Defendant's failure to discharge plaintiff's debt:—

Where the defendant agreed to discharge a debt due by plaintiff to a third party and no time was fixed for performance of the agreement, the defendant would be liable to plaintiff for any damage which the latter might sustain in consequence of the non-payment of the debt, even though such third party did not demand payment from the defendant; the defendant was bound to discharge the debt within a reasonable time. 23 M. 441.

(3) Breach of contract to cultivate indigo:—

The cause of action for a suit for damages for breach of contract to cultivate indigo cannot commence before the close of the sowing season. 6 W.R. 278.

4.—‘ When the Contract is broken ’—(concluded).

(4) Breach of covenant for further assurance :—

Where there is a covenant for further assurance, the cause of action for breach thereof commences only by refusal on the part of the covenantor or his representatives to execute a further assurance when required to do so by the covenantee or his representatives. 2 B. 273.

(5) Breach of covenant for title :—

Where a suit is brought for damages for breach of a covenant for title as to the present right of the grantor to convey, the period of limitation should be computed from the day on which the conveyance to the covenantee was executed. 2 B. 273.

(6) Suit for abatement of rent :—

Where an agreement provided that, if the lands mentioned therein be found less in quantity, there should be a certain abatement of rent, the six years' limitation for a suit for abatement of rent was computed from the date when the landlord continued to take rent according to the quantity of land named in the agreement. 22 W.R. 275.

(7) Money deposited for re-payment on a contingency :—

A suit for recovery of money deposited with the depositee, for repayment on the happening of a contingency, is governed by art. 62 and not by this article. 5 C. 830=6 C.L.R. 355. (See same case noted under art. 62 at p. 785 *supra*).

5.—‘ Successive breaches.’

(1) When cause of action arises :—

The cause of action for a suit for breach of a contract to be performed at different times must be calculated from each breach separately. B.L.R. Sup. Vol. 500=6 W.R., Act X, 61.

(2) Non-payment on due date :—

Where the obligor of a bond fails to pay the principal and interest on the due date, there cannot be said to be ‘ successive breaches ’ within the meaning of this article, or a ‘ continuing breach ’ within the meaning of S. 23 of this Act. 10 A. 85.

(3) Failure of mortgagor to give possession :—

The failure of a mortgagor by conditional sale to give possession of the mortgaged property to the mortgagee according to the covenant and to allow him to take the profits in lieu of interest, is not a case of successive breaches. 8 A.W.N. 15; 7 A.W.N. 292.

6.—‘ Continuous breach.’

(1) As long as a breach of an agreement continues, the party in default will be bound to pay damages to the other party to the contract. 6 A. 457=4 A.W.N. 168.

(2) See 19 A. 39 (P.C.)=23 I.A. 138, noted under No. 8 under Heading No. 1, *supra*.

General.**(1) Pleading :—**

- (a) A plaintiff must show on the face of a plaint that his cause of action accrued within the period of limitation ; and if his case be based on an assignment, he must mention the fact of assignment also in the plaint. 41 W.R. 47 (*reviewing* 19 W.R. 244).
- (b) Where a plaintiff sues for breach of contract and proves his case, the three years' limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some wrongful act of theirs, to which the shorter limitation would apply. *Per* Garth, C. J., in 12 C. 477 (*approving* 8 M. 107 and 7 B. 478).

(2) Merger of decree in private arrangement :—

Where a decree merges in a subsequent private arrangement between the parties, the arrangement can be enforced only by a separate suit and not by execution of the decree. To such a suit, it is apprehended, this article would apply, if the arrangement is unregistered. 51 P.R. 1885.

(Old Law).**(1) Suit for medical fees :—**

Where there was no contract as to the amount of fee to be paid to a Doctor, a suit by him to recover recompense for his medical service was governed by the three years' limitation under cl. 9, S. 1, Act XIV of 1859. 13 W.R. 96.

(2) Written deeds which could not be registered :—

The period of limitation applicable under Act XIV of 1859 to suits upon written instruments, which could not have been registered under the law in force at the time of execution of such instruments, was six years under cl. 16, S. 1 of that Act. 11 M. 207.

(3) Suit for money lodged with Collector to stay sale :—

A suit to recover a sum of money lodged by the plaintiffs in the Court of a Collector, in order to stay the sale of a *putni* talook for arrears of rent, was not barred, if brought within three years from the date of accrual of the cause of action. 13 B.L.R. 146 = 20 W.R. 380 (P.C.)

(4) Suit by yearly tenant :—

A suit by a yearly tenant, ten years after his ejection, for a breach of contract, was barred under cl. 10, S. 1 of Act XIV of 1859. 3 Bom. H.C.A.C. 27.

(5) Suit on Policy of Marine insurance :—

A suit to recover amount due on a policy of marine insurance fell under cl. 10, the cause of action arising from the date of notice of the loss to the defendant and his refusal to pay. 6 Bom. H.C.A.C. 34.

(6) Suit on instalment bond :—

In a bond payable by instalments with a condition that in default the whole shall become due, the limitation ran as to the whole debt from the date of default. 7 Bom. H.C.A.C. 125.

Part VII.—Six years.

- 116.**—For compensation⁽¹⁾ for the **Six years.** When the period of limitation would begin to run against a suit brought on a similar contract not registered.
- breach of a contract⁽²⁾ in writing registered⁽³⁾.

(Old Acts.)

[Art. 117, Act IX of 1871. On a promise or contract in writing registered—Six years—When the period of limitation would begin to run against a suit brought on a similar promise or contract not registered.

S. 1, cl. 10 of Act XIV of 1859. To suits brought to recover money lent, or interest, or for the breach of any contract, in cases in which there is a written engagement or contract and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof—the period of three years from the time when the debt became due or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof.]

(Notes)

. Scope of article.

The article is applicable only to suits, and not to applications. An application under S. 90 of the Transfer of Property Act is not governed by this article. In considering whether the recovery of the balance remaining due after sale of the mortgaged property is barred, the date of the suit and not that of the application under Section 90 of the Transfer of Property Act ought to be regarded. 6 O.C. 30 (B).

1.—‘ Compensation.’

- (1) The word ‘ compensation ’ is used in the same sense as it is used in Section 78 of the Contract Act. 12 C. 357 ; 8 M. 76.
- (2) Compare 8 B. 17 noted under Heading No. 2 at p. 738, *supra* (Lawyer's Companion).
- (3) **Suit for title-deeds against mortgagee:—**

This article is inapplicable to a suit to recover the title-deeds left with the mortgagee after redemption, as the suit is not for compensation for breach of contract in writing registered. 15 M. 157 (159).

A—Suits on bonds.**(1) Suit on registered bond :—**

A ————— for recovery of a specific sum of money is governed by this article. Such a suit is regarded as one for compensation for breach of contract. 3 A. 600 (F.B.) ; 3 A. 276 ; 2 A.W.N. 11 ; 4 A. 255—1 A.W.N. 159 (*referring to* 6 C. 94) ; 6 B. 75 ; 11 C.L.R. 361 ; 86 P.R. 1881 (*following* 51 P.R. 1880).

(2) Suit on instalment bond :—

This article is intended to apply to all contracts in writing registered. So, a suit on a registered instalment bond is governed by this article, notwithstanding the express provisions of art. 74. 18 C. 506.

(3) Bond executed by minor for necessities :—

The article is applicable to a suit against a minor on a registered bond executed by him for necessities. 21 C. 872.

(4) Suit by creditor against executor de son tort :—

A suit by the creditor of a deceased person to recover money due under a registered bond against an executor *de son tort*, is governed by this article. 3 M. 359.

(5) Suit bond hypothecating jaghir income :—

This article is inapplicable to a suit to recover money due on a bond hypothecating certain *jaghir* income, as the *jaghir* income is a benefit to arise out of immovable property and, as such, is governed by art. 132. 4 P.R. 1894.

(6) Suit by endorsee of registered pro-note :—

A suit by the endorsee of a registered pro-note to recover money due thereunder, brought more than three years after the date of the endorsement, was barred. 4 M.H.C. 366.

(7) See 4 M.H.C. 216, where a particular document was considered not to be a written contract or engagement.**B.—Suits for rent on leases &c.****(1) Suit by lessee for possession or damages :—**

A suit, by a lessee under a registered lease-deed, to compel the lessor to put him in possession of the lands leased or in the alternative for damages, is governed by this article. 25 M. 587—12 M.L.J. 249.

(2) Suit for rent due under a registered lease :—

A suit to recover arrears of rent upon a registered contract is governed by this article. 'Compensation' is used in the same sense in this article as in the Contract Act, S. 73. 3 M. 76.

(3) Suit for rent after tender of registered pattah :—

This article is inapplicable to a suit to recover arrears of rent after tender of a registered pattah but refused by the tenant, as the registered pattah cannot, when it is not accepted, operate as a contract entered into between the landlord and the tenant. 18 M.L.J. 485.

B.—Suits for rent on leases, &c.—(concluded).

(4) Suit for rent against mortgagor-lessee :—

A suit to recover arrears of rent against a mortgagor-lessee, who is holding over, is not governed either by this article or art. 132, but is governed by the three years' limitation. 11 M.L.J. 186.

(5) Suit for arrears of rent on registered contract :—

(a) This article is applicable to a suit to recover arrears of rent upon a registered contract. 51 P.R. 1880; 110 P.R. 1880.

(b) This article, and not art. 110, is applicable to a suit to recover arrears of rent upon a registered lease. 4 P.R. 1902.

(c) A suit to recover arrears of rent upon a registered contract is governed by this article. 15 C. 221.

(d) But see 26 A. 138 = A.W.N. (1903), 210, which decides that a suit to recover arrears of rent, based upon a registered lease, is not governed by this article, but by art. 110.

(6) Lease not for agricultural or horticultural purposes :—

(a) Where land is let out, not for agricultural or horticultural purposes, on a registered *kabuliat*, a suit for rents will be governed by this article, and not by the three years' rule contained in the Bengal Tenancy Act. 27 C. 205 = 4 C.W.N. 76.

(b) A suit for rent reserved by a registered lease, granted for building purposes and for establishing a coal depot, is governed by this article and not by the provisions of the Bengal Tenancy Act, the lease being not for agricultural or horticultural purposes. 19 C. 489.

(7) Suit upon registered *ekrar* :—

A suit upon an *ekrar*, executed by the priest of an idol, for recovery of arrears of maintenance, is governed by this article, being based upon a contract in writing registered. 23 C. 645.

C.—Suits for rent under Bengal Tenancy Act.

(1) A suit for rent, founded on registered contract in respect of land subject to the provisions of the Bengal Tenancy Act, is governed by the limitation provided in that Act, and not by this article. 19 C. 1. (F.B.)

(2) In cases governed by the Bengal Tenancy Act, there is no distinction between a registered and an unregistered lease, and one period of limitation governs all suits for rent brought under its provisions. 17 C. 469.

D.—Suits on Mortgage Deeds.

(1) Suit for personal remedy on hypothecation bond :—

A suit, instituted more than six years after the date fixed for payment, to recover money due under a hypothecation bond against the defendant, personally as well as on the mortgage security, was held barred by limitation so far as the personal remedy was concerned. 11 M. 56.

D.—Suits on Mortgage Deeds.—(continued).**(2) Suit on mortgage-deed——Personal remedy :—**

A suit, brought more than six years after the date of refusal, to recover money due on a mortgage, against the defendant personally as well as on the mortgage security, is barred by limitation so far as personal remedy is concerned. 90 P.R. 1881.

(3) Suit for mortgage-money against mortgagor personally :—

A suit by the mortgagee, for recovery of the amount due under a registered mortgage, against the mortgagor, personally, is governed by this article and not by art. 132. 5 A. 461—3 A.W.N. 114 (*distinguishing* 6 B. 710).

(4) Registered mortgage containing no personal covenant :—

Where a registered mortgage-deed contained no personal covenant to pay the debt and the mortgage security was sold for arrears of rent due by the mortgagor, a suit to recover the debt personally from the mortgagor was held governed by the three years' limitation. 11 B. 475.

(5) Suit for mortgage-money owing to default of mortgagor :—

A suit to recover money on a registered *kanon* deed, owing to the failure of the mortgagor to secure the mortgagee in possession, is governed by the six years' limitation provided for either in art. 120 or in this article. 21 M. 242—8 M.L.J. 81.

(6) Suit by mortgagor for balance of mortgage-money :—

A suit by the mortgagor against the mortgagee for balance of the consideration payable by the latter to the former, and for damages, in the shape of interest, for non-payment of the amount in time, is governed by this article. 18 A. 200—11 A.W.N. 5 (*referring* to 6 C. 94; 3 M. 76; 6 B. 75; 3 A. 276 & 3 A. 600).

(7) Suit by mortgagee for money :—

Where a mortgaged property was sold for non-payment of Municipal Taxes and the mortgagee was dispossessed in consequence, a suit by the mortgagee to recover the mortgage-money, brought within six years from the date of sale and dispossession, was not barred. 1 P.L.R. 201.

(8) Suit against son for money-decree on mortgage by father :—

Where, in the case of a mortgage deed executed by a Hindu father in a joint Hindu family governed by the *Mitakshara*, it is not proved that the money was required to pay off an antecedent debt or that it was incurred for immoral or illegal purposes, it cannot bind the son as a mortgage after the father's death; the mortgagee would be entitled to a money-decree against the son, only if the suit is brought within six years from the due date of the mortgage deed. 27 C. 702.

(9) Suit by mortgagee for sale :—

Where a mortgage deed provided that the amount secured should be repaid by a certain date and also provided for possession being delivered to the mortgagee, cause of action for the latter's suit for sale will commence from the date fixed for payment of money, and not from the date when there was default in delivering possession. 18 A. 371—16 A.W.N. 107.

D.—Suits on Mortgage Deeds.—(concluded).

(10) Suit on deed purporting to be, but not, a mortgage deed :—

A suit for recovery of money secured by a registered deed purporting to be, but not in fact, a mortgage deed, is governed by this article, if the deed be registered. 14 A. 162=12 A.W.N. 27.

(11) Failure of mortgagor by conditional sale to deliver possession :—

The failure of a mortgagor by conditional sale to deliver possession to the conditional vendee and to allow him to enjoy the profits in lieu of interest, is not a case of 'successive breaches' within the meaning of this article. 8 A.W.N. 15.

E.—Post Diem interest.

(1) Claim for post diem interest :—

(a) A claim for interest *post diem* in a suit on a mortgage-deed brought more than six years after the date when the principal is due, the deed not providing for the payment of *post diem* interest, is governed by this article, and will be barred by limitation unless brought within six years of the period fixed for payment of the principal. 18 M. 331; 2 M.L.J. 235; 18 M. 257; 8 C.P.L.R. 95; 11 A. 416=9 A.W.N. 165; 10 A. 85; 11 A.W.N. 126; 17 A. 581=15 A.W.N. 128 (F.B.).

But see 19 A. 39=1 C.W.N. 52 (P.C.) noted under No. 3, *infra*.

(b) Where there is no stipulation in a deed of conditional sale to pay interest after the day fixed for the repayment of principal and interest, a suit for interest after due date, being one for compensation, must be brought within six years from the date of breach. 19 C. 19.

(c) Where, upon the terms of a mortgage-bond payable by instalments, interest is not expressly made payable after the date of the instalment, it will be allowed only by way of damages and, that too, not beyond six years from the date fixed for payment of the last instalment. 19 C. 23 (Note)=1 C.W.N. 437.

(2) Post diem interest awarded under the Interest Act :—

Interest *post diem* awarded under the Interest Act XXXII of 1839, is not governed by the six years' limitation and may be recovered as a charge on the mortgaged property and, as such, is governed by art. 132. 18 M. 248. See also 17 A. 581=15 A.W.N. 128 (F.B.).

(3) Decision of the Privy Council :—

A suit to recover *post diem* interest on a registered mortgage deed will be governed by this article, if the interest be claimed as damages for breach of contract, such breach continuing as long as the principal remains unpaid. 19 A. 39 (P.C.)=1 C.W.N. 52.

(N.B.)—1. This decision was passed on appeal from 17 A. 581=15 A.W.N. 128 (F.B.)

2. This decision must now be considered as *overruling* the cases in No. 1 *supra*, since it decides that interest may be claimed as damages for breach of contract, and that the breach continues as long as the principal remains unpaid and that the plaintiff may claim, and the Court may award, interest for six years next preceding the suit.

E.—Post Diem interest.—(concluded).**(4) Suit for interest on anomalous mortgage :—**

Where a transaction is an anomalous mortgage and where the intention of the parties is that the mortgagee should not be entitled to a decree for sale in respect of interest, interest can be awarded only as damages, and such damages will not be a charge on the land. The suit for such damages will be governed by this article. 7 O.C. 11.

F.—Suits based on partnership deeds.**(1) Suit for account of a dissolved partnership :—**

(a) A suit for an account of a partnership dissolved more than three years before the institution of the suit, is barred by limitation, and is beyond the scope of this article, even if the partnership agreement is registered. 8 M.L.J. 151=22 M. 14.

Per Curiam :—We are not prepared to say that the article can be stretched to cover every case in which the plaintiff's suit may, in its origin, be referred to a contractual relationship expressed in a registered agreement. 8 M.L.J. 151=22 M. 14.

(b) Where a registered partnership contract binds the parties to pay the loss according to their respective shares, a suit to recover the defendant's share of the loss, on a settlement of accounts between the plaintiffs and the defendants, is not governed by art. 64 nor by art. 106 but by this article. 1 M.L.J. 432 =14 M. 465.

2.—' For the breach of a contract.'

(1) This article applies only to suits on contracts which are wholly in writing registered and signed by both parties to the contract. 1 M.L.J. 737.

(2) Agreement signed only by one of the parties :—

If an agreement is signed by one only of the parties thereto there will not be any 'contract in writing' within the meaning of this article, unless the assent of the other party appears in any way from the agreement itself. 3 Bom. L.R. 667.

(3) Registered contract signed by only one of the parties :—

This article is applicable to a suit for rent under a registered contract signed by the lessee only inasmuch as the contract is a 'contract in writing registered' within the meaning of this article. 19 M. 52=5 M.L.J. 228.

(4) Mere recital not a contract :—

The mere recital in a sale-deed that the consideration had been paid cannot be construed as a 'contract in writing' to pay the consideration money, within the meaning of this article. But a document in writing, registered, given by the vendor to the purchaser, acknowledging receipt of purchase money, would be a 'contract in writing' though the document may not be signed by the purchaser. 25 M. 55=11 M.L.J. 318.

2.—‘For the breach of a contract.’—(concluded).

(5) Agreement recited in registered deed :—

An agreement not separately drawn up and registered, but contained in a registered mortgage-deed, is an ‘agreement in writing registered,’ within the meaning of this article. 25 M. 50.

(6) Untrue recital in sale deed :—

Where there is no separate contract in writing as regards the payment of purchase money for sale but the registered sale deed recites that it was paid, when in fact it was not, a suit for the unpaid purchase money will not be governed by this article. 24 M. 233—10 M.L.J. 349 (*distinguishing* 21 M. 8.)

(7) Prior oral agreement contained in registered contract :—

If the oral agreement or contract of sale which precedes an actual sale be reduced to writing in the deed of sale itself, which is registered, a suit for the purchase-money would be governed by this article, even though the sale deed acknowledged the payment and receipt of the price, when in fact it was not paid, but its receipt was acknowledged in anticipation of payment being made. 25 M. 55=11 M.L.J. 318.

3.—‘In writing registered.’

(1) Endorsement without signature :—

An endorsement without signature was not a written engagement which could be registered, within the meaning of cl. 10, S. 1, Act XIV of 1859. 5 W.R. 45.

(2) Deeds that could not be registered :—

Under Act XIV of 1859, a suit upon written instruments which could not be registered by virtue of the law then in force, was governed by the six years’ limitation under cl. 16, S. 1. 11 M. 207.

(3) Attestation before Cazeer not registration :—

Attestation before a Cazeer was not registration within the meaning of cl. 10, S. 1, Act XIV of 1859, and a suit for rent upon a lease so attested was governed by three years’ limitation. 1 W.R. 89.

(4) Registration under Dekkhan Agriculturists Relief Act :—

A suit against a surety to recover arrears of rent due under a lease-deed registered under this Act, is governed by the six years’ limitation prescribed in this article, the cause of action arising from the date of the default of the principal debtor to pay rent, registration under the above Act being equivalent to registration under the Registration Act. 9 B. 920.

(5) Registration invalid :—

A suit by a mortgagee for money, the registration of the mortgage-deed being found to be invalid for want of jurisdiction in the Registering officer, is governed by this article, and will be in time if brought within six years. 29 C. 664=6 C.W.N. 866.

3.—'In writing registered.'—(concluded).

(6) Some only of the executants registering bond :—

Where a bond is registered by some of the executants and not by all, as against the parties to the registration, it is governed by this article. 13 P.R. 1876.

(7) Suit to recover purchase-money :—

A suit to recover the purchase-money paid in respect of a registered sale-deed, as damages, on the ground that the defendant-vendor had no title to convey, is governed by this article, as the law implies a covenant for title. 1 M.L.J. 479.

(8) Breach of covenant for title :—

Where a covenant for title, embodied in a registered sale deed, is broken, this article will apply to a suit for damages in respect of the breach. 1 M.L.J. 162.

(9) Suit by vendee for difference in profits :—

- A suit by a vendee to recover damages in the shape of difference between profits guaranteed of a land sold and the profits actually realized is governed by this article, the sale deed being registered, and not by art. 65. 18 A. 160 = 16 A.W.N. 15.

(10) Suit by principal against agent's representatives :—

Where the contract under which an agent is employed is contained in a duly registered instrument, a suit to recover money collected by the latter in the course of his duties as agent and misappropriated by him would be governed by this article, whether the suit be for compensation for a liquidated or unliquidated sum. But if the suit be for recovery of sums received by him in the course of transactions which did not come within the scope of the registered agreement, this article would not apply. 12 C. 357.

(11) Suit by principal against agent :—

A——— on the basis of a registered agreement is not governed by art. 89 but by this article, time beginning to run from the date of the breach of contract to render accounts. If the account has to be rendered at the close of every year, the plaintiff can't get accounts for more than six years before suit. If the agreement is unregistered, art. 115 will apply. 1 C.L.J. 211.

(12) Suit to recover money due under a registered award :—

But a suit to recover the balance of money due under the terms of an award is not governed by the six years' limitation, even though the award was registered, as the suit is not one for compensation for breach of contract in writing registered, but for the specific enforcement of the award. 16 A. 3.

Compare Nos. 1 to 6 under heading A at p. 876 *supra*.

117.—Upon a foreign judgment⁽¹⁾ *Six years.* The date of the judgment, as defined in the Code of Civil Procedure.

(Old Acts.)

[Art. 116 of Act IX of 1871.—Col. 1.—(Upon a judgment obtained in a foreign country. Cols. 2 & 3.—same as above.

Art XIV of 1859.—No corresponding provision.]

(Notes)

1.—‘Foreign Judgment.’

(1) Judgments of Courts of Native States :—

Judgments of the Courts of Native States having independent civil, criminal and fiscal jurisdiction, must be regarded as foreign judgments, and suits can be brought upon them in British Courts. 4 M.L.J. 267 (P.C.) = 22 C. 222 = 21 I.A. 171 ; 7 M. 164 ; 21 A. 17 and 24 B. 86.

But see 8 B. 593 & 6 B. 292, which had held, before the Civil Pro. Code Amendment Act VII of 1888, that no suit could be maintained in British Courts in India on the judgments of Courts in Native States..

(2) Suit unsustainable—Foreign Judgment ex parte :—

In a personal action (for money) in a Foreign Court, where the defendant did not submit himself to the jurisdiction of that Court and an *ex parte* decree was pronounced against him, no action will lie in a Court of British India, as such a decree is an absolute nullity. 18 M. 327 ; 4 M.L.J. 267 (P.C.) = 22 C. 222 = 21 I.A. 171.

(3) Foreign judgment—Law of limitation :—

Where limitation bars the remedy, but does not destroy the right, the judgment of a foreign tribunal is not open to the objection that the suit (on a contract) was barred by the Law of Limitation applicable in the country where the contract was made. 2 M. 400.

(Old Law).

(4) Under Act XIV of 1859, though there was no express provision for the period of limitation for suits on foreign judgments, such suits were governed by the six years' limitation, the cause of action arising from the date of the decree of the foreign Court. 4 W.R. 108 and 8 W.R. 32.

118.—To obtain a declaration⁽¹⁾ *Six years.* When the alleged adoption that an alleged adoption is invalid, or never, in fact, to the plaintiff.⁽²⁾ took place.

(Old Acts.)

[Art. 129 of Act IX of 1871.—To establish or set aside an adoption—Twelve years.—The date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father.

S. 1, cl. 16, of Act XIV of 1859.—To all suits for which no other limitation is hereby expressly provided—the period of six years from the time the cause of action arose.]

119.—To obtain a declaration that *Six years.* When the rights of the adopted son as such are interfered with.⁽³⁾
an adoption is valid.

(Old Acts.)

[Art. 129 of Act IX of 1871.—See the same printed under article 118, *supra*.]

(Notes)

1.—‘To obtain a declaration.’

A.—Articles inapplicable.

ALLAHABAD CASES.

(1) Suit for possession on title :—

- (a) A suit by an adopted son, to recover the moveable and immoveable property of his adoptive father in wrongful possession of defendant, is a suit for possession on title, and is governed by art. 144 and not by art. 119. 26 A. 40.
- (b) A suit by a person alleging himself to be an adopted son for recovery of immoveable property on the basis of a title as adopted son will not be governed by article 119 but by art. 144, notwithstanding the fact that the defendant denies the adoption and the plaintiff himself admits that his rights as adopted son were interfered with more than six years before suit. Nor does the fact that it is necessary, in such a suit, to decide the question of the truth, validity or otherwise of the adoption make these articles applicable. 24 A. 195.
- (c) Article 118 is inapplicable to a suit for possession of immoveable property, even though it is incidentally necessary to find in that suit that an adoption is invalid or never in fact took place; the article applies only to suits for a declaration that an adoption is invalid or in fact never took place. 17 A. 167 = 15 A.W.N. 36.
- (d) See also 13 B. 160, where it was held that the article is applicable only to a suit for a bare declaration.
- (e) Article 119 applies only to a suit to obtain a pure declaration that an adoption is valid. A suit for possession is distinct from such a suit. The article does not become applicable simply because a question as to the validity of adoption crops up therein for decision. 8 A. 644 = 6 A. W.N. 232.
- (f) Which article of the Act will apply to a suit to recover possession of immoveable property in which the plaintiff cannot succeed without getting rid of an adoption or an alienation or deed, was left open by the Chief Justice. 14 A. 156 (159).

(2) Suit for declaration and some other relief :—

- (a) A suit for possession of immoveable property and for a declaration that an alleged adoption was invalid, brought more than six years after the plaintiffs were aware of the adoption, was barred. 10 A.W.N. 241.
- (b) The same principle applies to a suit for a declaration that an alleged adoption of defendant is invalid and that plaintiff is the reversionary heir. 6 A.W.N. 244.

1.—'To obtain a declaration.'—(continued).

A.—Articles inapplicable—(continued).

CALCUTTA CASES.

(1) **Suit for bare declaration:—**

These articles only apply to a suit for a declaration as to the validity of the adoption, and not to one for possession of immoveable property, though the plaintiff may have to establish the adoption as the basis of his title. 25 C. 354.

(2) **Suit for possession of immoveable property:—**

Article 118 does not apply to a suit for possession of immoveable property, though it might, in such a suit, be necessary to prove the invalidity of an adoption. 27 C. 242=4 C.W.N. 405.

(3) **Suit by reversioner:—**

Though a suit for a declaration, that an adoption by a widow to her husband is invalid, should be brought within the period provided by art. 118, still a suit for possession by the reversioner would be in time if brought within twelve years from the date of the widow's death or when the estate fell into possession. 14 C. 401.

13 C. 308 = 13 I.A. 84 (P.C.) distinguished on the ground that that was a case with reference to art. 129 of the Act of 1871, that, in that case, the cause of action had arisen under Act IX of 1871, and that, before the completion of the title by twelve years' adverse possession, the Act of 1877 came into force.

PRIVY COUNCIL CASES.

(1) **Adoption not to the last male owner, but by widow to herself:—**

If the reversioner's suit for possession of the estate of the last male owner is resisted by a person alleging himself to be the adopted son of the last owner, but it is found that the adoption was by the widow of the last male owner, not to the last male owner, but to herself, article 118 would not apply, because the suit relates to the husband's, and not the widow's estate. 22 C. 600 = 22 I.A. 51 (P.C.)

(2) **Suit for declaration only:—**

A suit to obtain a declaration that an alleged adoption is invalid is in time, if brought within six years from the time when the alleged adoption becomes known to the plaintiff. 24 C. 1 (P.C.) = 23 I.A. 97.

BOMBAY CASES.

(1) **Suit for possession:—**

Article 118 will not apply to a suit for possession, unless the successful challenge of an apparent adoption is a necessary condition precedent to the claim for possession. 26 B. 720 = 4 Bom. L.R. 516. See also, 30 C. 990 (1906).

(2) **Adopted son of junior widow versus adopted son of senior widow:—**

A suit by the adopted son of the junior widow of a deceased owner to recover possession of property from the adopted son of the senior widow, on

1.—‘To obtain a declaration.’—(continued).

A.—Articles inapplicable—(continued).

BOMBAY CASES—(concluded).

the ground that the former was the rightful heir of the deceased, was not governed by this article and was barred under art. 144, inasmuch as as the defendant's possession, when tacked to that of his adoptive mother, was for more than twelve years prior to suit. 18.B. 160.

(3) Suit by devisee :—

Art. 140, and not article 118, applies to a suit by a devisee to obtain possession of immoveable property devised by a will and for a declaration that an alleged adoption was invalid or never in fact took place, the prayer for declaration being auxiliary or subservient to the prayer for possession. 21 B. 159.

(4) Lapse of time not validating an invalid adoption :—

A reversioner can bring a suit for possession of immoveable property within twelve years from the death of the widow, and he need not have brought a suit, for a declaration that an adoption made by her was invalid, within six years thereof. Article 118 does not operate to give validity, by lapse of time, to an invalid adoption. 21 B. 376.

MADRAS CASES.

(1) Suit for possession :—

Per Bhashyam Ayyangar, J., in 26 M. 291—13 M.L.J. 27 :—Art. 119 is applicable only to a suit, of the character defined by S. 42 of the Specific Relief Act, for a declaration that the plaintiff is entitled to a status or legal character as adopted son. It does not apply to a suit for possession based on title even though it may, in such a suit, be necessary to decide upon a question of adoption.

(2) Suit by reversioner :—

(a) A suit by a reversioner to set aside an adoption made by a Hindu widow, more than twelve years from the date of the adoption, but within two years of the death of the widow, is not governed by art. 118 and not barred. 6 M.L.J. 35 (*distinguishing* 20 C. 487). This is an *obiter dictum*.

(b) A suit by a reversioner for a declaration that an adoption said to have been made by a Hindu widow more than eighteen years before the date of suit was invalid and that a sale of certain property made by the widow and the adopted son two years before suit was not binding on him, held not barred by limitation as the suit was substantially brought to declare the invalidity of the alienation and the declaration as to the adoption was ancillary to that claim. 5 M. 121.

(3) Adoptions other than those under Hindu Law :—

These articles relate to the adoption of a son according to the ordinary Hindu Law, but do not extend to the adoptions of females as under the Malabar Law or according to the usage of women of the dancing-girl caste. 9 M.L.J. 196.

1.—‘To obtain a declaration.’—(continued).

A.—Articles inapplicable—(continued).

PUNJAB CASES.

(1) Adoption void ab initio :—

Article 118 will not apply where no adoption took place in fact, or where it was void *ab initio*, the reason being that, in such a case, there will be no necessity, on the part of plaintiff, to set it aside, because his rights are not affected. 14 P.L.R. 1902.

(2) Alleged adoption untrue :—

(a) Article 118 is inapplicable to a suit to recover possession of immoveable property where it is found as a fact that the adoption set up by the defendant had not taken place at all. 14 P.L.R. 1902.

(b) A suit falling within the description of article 118 will not be barred by its provisions, where from the evidence it is found that the alleged adoption never took place or that there is no *prima facie* evidence that it did take place. 79 P.R. 1894 (F.B.)

(3) Adopter having no power to adopt :—

(a) Where the adopter has no inherent power to adopt, article 118 is not applicable to a suit to declare the adoption invalid. 67 P.R. 1901.

(b) The adoption mentioned in article 118 refers to a transaction, by a person with some inherent right to adopt, which is denied as a fact or challenged as being invalid on some ground of law or custom, which does not go the length of asserting that the adoption, as an adoption, is wholly impossible. 144 P.R. 1892.

(4) Suit by reversioner :—

A suit for possession of immoveable property against an alleged adopted son, brought more than six years after the alleged adoption, but within twelve years from date of the estate falling into possession, was not barred. 55 P.R. 1897.

(5) Suit for possession :—

Querre :—Whether a suit for possession, where an effective adoption is in dispute, is the same thing as a suit for a declaration of the invalidity of an adoption under art. 118 of the Act of 1877 ? 93 P.L.R. 1903 (F.B.) (at p. 373).

(6) Plaintiff not bound to set aside adoption :—

Where, in a suit for possession, the plaintiff is not bound to seek any direct relief by way of cancellation of an adoption, the suit will not be governed by article 118. 96 P.R. 1893.

CENTRAL PROVINCES CASES.

Suits for possession :—

(a) Suits to declare that an adoption is invalid or in fact never took place fall within article 118, and it does not apply to a suit for possession of property simply because it may be incidentally necessary to find that a given adoption is invalid. 11 C.P.L.R. 49.

(b) Article 118 only relates to a suit for a declaration that an adoption is invalid or never took place, but does not bar suits by reversioners for possession, after expiry of six years from date of adoption, but within twelve years from the death of the widow. 3 C.P.L.R. 32.

1.—‘To obtain a declaration.’—(continued).**A.—Articles inapplicable—(concluded).****ODDH CASE.****(1) Suit by reversioner :—**

An adoption by a widow without authority from her husband is invalid. A reversioner is not bound to set aside such an adoption. A suit by him for recovery of possession, brought more than six years from the adoption, will not be barred by article 118. 1 O.C. 80.

B.—Articles applicable**BOMBAY CASES.**

- (1) A suit questioning an adoption independently of any claim to property falls within article 118. 5 Bom. J.R. 584.
- (2) Article 118 is applicable only where the question is not as to the *factum* but the validity of an adoption. 28 B. 94. 5 Bom. L.R. 708.
- (3) A suit for a declaration that an adoption is invalid must be brought within six years from the date on which the plaintiff came to know of the adoption and the fact that the adoptive father died within six years of the date of the suit cannot save limitation. 27 B. 614=5 Bom. L.R. 588.

Suits by reversioners :—

- (a) A reversioner is bound to institute a suit to set aside an adoption within six years after he had knowledge of it. 4 Bom. L.R. 893.
- (b) A suit by a Hindu reversioner to recover possession of immoveable property on the death of a childless widow is barred by art. 118, if the claim to such possession cannot be established without setting aside an adoption of which the plaintiff had become aware more than six years before suit. 25 B. 26=2 Bom. L.R. 495.
- (c) Art. 141 applies to the ordinary simple case of a reversioner where the validity of the defendant's adoption is not the substantial point in dispute, but art. 118 would apply where the defendant claims to be in possession to the knowledge of plaintiff in virtue of an adoption. 24 B. 260 (F.B.)

MADRAS CASES.**Suit by an adopted son more than six years after interference with his rights :—**

- (a) *Per Moore & Benson, JJ.* :—Where a plaintiff cannot obtain a decree for possession without a decision that an adoption is invalid or never in fact took place, or that an adoption is valid, the question whether his claim is barred by limitation must be decided with reference to the provisions of arts. 118 & 119 of Sch. II to the Limitation Act. 26 M. 291=13 M.L.J. 27.

Per Bhashyam Ayyangar, J. :—The suit is governed by art. 144. Art. 119 is applicable only to a suit of the character defined by S. 42 of the Specific Relief Act, for a declaration that the plaintiff is entitled to a status or legal character as adopted son. 26 M. 291=13 M.L.J. 27.

1.—‘To obtain a declaration.’—(continued).

B.—Articles applicable—(continued).

MADRAS CASES—(concluded).

- (b) A suit for possession of her husband's property by a Hindu widow as heiress, against a person in possession claiming, to the knowledge of the widow for more than six years, to be the adopted son, *held* governed by art. 118 and barred by limitation. 20 M. 40.
- (c) Suits in which no relief can be given to the plaintiff without impeaching an alleged adoption are also governed by this article. It is not confined in its operation only to suits in which a bare declaration is asked. 6 M.L.J. 272.
- (2) **Suit by reversioner :—**
- (a) A suit by a reversioner to have an adoption made by the widow of the last owner declared invalid, on the ground that the adoption was made without the owner's authority, was a fit case for a declaratory decree. 7 M.H.C. 351.
- (b) The cause of action in a suit, brought by a daughter's son as reversioner to his maternal grand-father, to set aside the adoption made by the widow, arises when the adoption becomes known to the daughter. *Held*, that the suit is governed by art. 118 and that the ‘plaintiff (daughter's son)’ was a person claiming through, or from, the daughter within the meaning of Section 3. 24 M. 405

PUNJAB CASES.

(1) **Suit for annulment of adoption and other relief :—**

Whenever the validity or invalidity of an adoption comes into question, that point can only be raised within six years from the date when the alleged adoption became known to the plaintiff, and such period cannot be extended by the fact that a prayer for possession or other relief is sought with the annulment of the adoption. 20 P.R. 1902.

(2) **Effect of admission of adopted son's title :—**

A suit to obtain a declaration that an alleged adoption is invalid or never took place will be barred, if brought more than six years after the plaintiff had knowledge of the adoption. An admission by the widow of the adoptive father, as regards the title of the adopted son, cannot extend the period of limitation or give a fresh starting point of limitation. 116 P.R. 1901=178 P.L.R. 1901.

(3) **Suit by reversioner :—**

- (a) Where a person is in possession of immoveable property under an alleged adoption, a suit by the reversioner for possession of the property will be governed by this article, and barred unless brought within six years provided by art. 118. 71 P.R. 1901.
- (b) A suit by plaintiff for possession of property left by his deceased brother, on the allegation that the deceased had adopted the defendant but that the adoption was invalid according to custom, was *held* barred by limi-

1.—'To obtain a declaration.'—(concluded).

B.—Articles applicable.—(concluded).

PUNJAB CASES—(concluded).

tation, having been brought more than six years from the date of adoption, which had taken place with the full knowledge of the plaintiff. 11 P.L.R. 1902.

(4) **Suit by reversioner of a childless proprietor:—**

A ——— for a declaration of the invalidity of a gift made by the proprietor in favour of defendant, a sister's grandson, brought more than six years from the adoption of the latter, with the knowledge of the plaintiff, is governed by art. 118 and barred. 13 P.L.R. 1904.

(5) **Suit by Mahomedan reversioner:—**

A suit by the daughter of a Mahomedan owner, for a declaration, after cancellation of an adoption, that an alienation made by the widow of the owner was null and void against the daughter's rights, after the widow's death, was governed by article 119. 45 P.R. 1892.

(N.B.)—Suits of this kind are, it is apprehended, peculiar to Punjab alone.

2.—'Becomes known to the plaintiff.'

- (a) The words "becomes known to the plaintiff" must be understood in their natural meaning, and the word "plaintiff" cannot include a reversioner standing in the same grade as another and claiming as heir of the last male owner in common with such other. 13 M.L.J. 359.
- (b) To constitute knowledge, there must be knowledge, not necessarily first hand, of that which is alleged to be the adoption, of the facts and circumstances which are said to constitute the adoption and serve as some basis for the allegation. 5 Bom. L.R. 584.
- (c) In a suit for a declaration that an alleged adoption is invalid, the *factum* of adoption being disputed, limitation begins to run from the date, when the alleged adoption becomes known to plaintiff. 9 A. 258 [*distinguishing* 13 C. 308=13 I.A. 84 (P.C.)]

3.—'Interfered with.'

Definition of:—

- (a) The interference mentioned in article 119 is obviously an interference which must amount to an absolute denial of the status of adoption held by the plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that status. The article has no application to a case where the facts suggest that the interference, such as it was, was intended to have no greater effect than that of postponing the right of the adopted son to succeed as heir to the property of his adoptive father. 28 B. 94=5 Bom. L.R. 708.
- (b) The interference need not necessarily be in relation to the very property sought to be recovered in the suit.

Where the defendant interfered with the plaintiff's rights as adopted son in relation to one property and the plaintiff's suit was brought, more than six years after the interference, with regard to some other property, it was held to be barred by art. 119. 13 M.L.J. 145.

3.—‘*Interfered with.*’—(concluded).

- (c) The interference alluded to here must be an interference caused by the defendant to the suit, and not an interference caused by some third person. 26 A. 40.
- (d) A suit by an alleged adopted son to recover immoveable property alienated by means of a gift, by the adoptive mother, in favour of her daughter, is governed by art. 119, the cause of action arising from the date of the alienation. Such an alienation is an interference with his rights as adopted son. 13 M.L.J. 144.
- (e) Where a person does not file a suit to obtain a declaration of the validity of his adoption within six years from the date when his right as adopted son was interfered with, he cannot afterwards be permitted to sue for possession of the property and avail himself of the longer limitation for such suit and raise the question of adoption in an indirect way. 8 P.R. 1904=48 P.L.R. 1904.

General.

(1) **Widow barred—Reversioner barred:—**

Adverse possession by an alleged adopted son against a Hindu widow for more than twelve years will also bar the reversioner entitled to possession after the widow's death. 10 A. 485.

(2) **Mother barred—Son barred:—**

Where an alleged adopted son of a last male holder was in adverse possession for more than twelve years to the knowledge of plaintiff's mother, the daughter of the last male holder, and she did not take any action to set aside the adoption, a suit by the plaintiffs, the sons (subsequently born) of the daughter, *held* barred. 1 A.W.N. 89.

(Old Law.)

Case under Act IX of 1871.

Under Act IX of 1871, the right of a person to bring a suit to set aside an adoption was *distinctly* recognised. 1 B. 248.

The words “set aside an adoption” in art. 129 of Act IX of 1871 meant any process in which the fact or validity of an adoption was disputed. 5 C.W.N. 10 (18)=25 B. 397 (350) (P.G.).

Suit to set aside an adoption:—

A suit by a person alleging himself to be an adopted son, for recovery of property, from a person alleging himself to be in possession also as an adopted son, having, in order to succeed, brought into question the second adoption, was a suit ‘to set aside an adoption,’ and was governed by art. 129 of Act IX of 1871, the Act in force when the cause of action arose. The suit, being barred under that Act, could not be revived by the present Act. 20 C. 487=20 I.A. 30 (P.G.).

(Old Law.)—(continued).

Suit by reversioner :—

Art. 129 of the old Act (IX of 1871) applied to all suits in which the validity of an adoption was brought into question and the rule of limitation contained in that article applied to all suits in which the plaintiff could not succeed without displacing an apparent adoption, in virtue of which the defendant was in possession. So, a suit by a reversioner, bringing an adoption, that took place when Act IX of 1871 was in force, into question, more than twelve years from the date of the adoption, but within twelve years from the time the estate fell into possession, *held* barred. 18 C. 308 (P.C.) = 18 I.A. 84.

6 I.A. 110 (P.C.) *distinguished*, on the ground that, there, the plaintiff's title was not affected by the widow's adoption.

* See 6 C.L.R. 12 = 6 I.A. 110 (P.C.), where it was *held* that the plaintiff's suit, which was governed by art. 129, Act IX of 1871, was not, though brought more than twelve years from the date of an alleged adoption, barred by limitation, because the adoption, being by a widow not to her husband but to herself, did not affect the plaintiff's right to succeed; the plaintiff was not, therefore, bound to set aside the adoption.

See 6 C.L.R. 46, which was very similar to 6 C.L.R. 12 (P.C.) and was governed by that decision.

The words 'adoptive father,' in art. 129 of Act IX of 1871, did not include adoptive mother. 23 W.R. 285 = 15 B.L.R. 9 (Note).

Adoption to last male owner in 1854 by a Hindu widow. Widow died 1883. Plaintiff's father alive at adoption and knew the adoption. Plaintiff's father died 1875. Plaintiff attained majority 1894, being born in 1873. Suit by plaintiff in 1895. *Held* barred by art. 129 of Act IX of 1871, time having begun to run in plaintiff's father's lifetime. 27 C. 379.

Under Act IX of 1871, the period of limitation for a suit to set aside an adoption began to run from the date of adoption, in cases in which the adoptive father died before the adoption took place. 23 W.R. 285 = 15 B.L.R. 9 (Note).

Cases under Act XIV of 1859.**(1) Suit to set aside an adoption :—**

(a) A suit to set aside an adoption was, under Act XIV, required to be brought within twelve years from the cause of action. 1 W.R. 62.

(b) In a suit by a daughter to inherit immoveable property by setting aside an adoption made by her mother, the twelve years' limitation, under Act XIV of 1859, was computed from the date of adoption. W.R. 1864, 272.

(c) Under Act XIV of 1859, a suit for a declaration that the plaintiff was the legitimate son of a person and for setting aside an adoption was governed by cl. 18, S. 1 of the Act. 1 B. 248.

(Old Law).—(concluded).

(2) Suit for declaration of invalidity of adoption :—

Under Act XIV of 1859 the period of limitation for a suit to have an adoption declared invalid ran from the date of adoption, except where the fact of adoption was concealed by means of fraud. 23 W.R. 42=15 B.L.R. 1.

(3) Presumption as to validity of adoption :—

See 15 W.R. 41 (P.C.)=7 B.L.R. 216=14 M.I.A. 67, as to the presumption of the validity of an adoption arising from the long recognition of the adoption by members of the family of the adoptor and other persons.

(5) Reversioner not bound to sue on knowledge :—

The knowledge of the fact of an adoption does not impose an obligation on the reversioner to sue; he can wait till the death of the widow. 11 W.R. 477.

(6) Suit by a reversioner :—

(a) A suit, on behalf of a minor, to set aside an adoption made by his maternal grandmother and recover possession of property belonging to his maternal grandfather, brought more than twelve years after the date of adoption, was not barred, as, under the circumstances of the case, the right of the plaintiff to sue accrued only on the death of his grandmother. 11 W.R. 468=3 B.L.R.A.C. 145.

(b) Where a reversioner denies the validity of an adoption made by the widow of the last owner, the cause of action for a suit by him to recover possession of the property arises at the time of the death of the widow. 4 B.L.R. 3=12 W.R. 14 (F.B.).

120.—Suit for which no period of *Six years*. When the right to sue limitation is provided elsewhere in this schedule. *accrues.*

(Old Acts.)

[Art. 118 of Act IX of 1871.—Same as above.

S. 1, cl. 16 of Act XIV of 1859.—*To all suits for which no other limitation is hereby expressly provided—the period of six years from the time the cause of action arose.*

(Notes)

Scope of article.

- (1) The article would not apply unless the Court is satisfied that there is no other article in the Act specifically applicable to the particular suit; where there are two articles covering a case, one specific and another general, the specific article will apply in preference to the general one. 3 C.W.N. 464 (F.B.); 3 A. 170.
- (2) Under this article the question is not when the cause of action arises, but when the plaintiff's right to sue arises. So, where the nearest reversioner failed to contest an alienation made by a widow, within the time prescribed by art. 125, the next reversioner would be entitled to sue. 9 C.W.N. 25.

Scope of article—(concluded).

(3) Public Demands Recovery Act :—

A suit to set aside a sale in execution of a certificate obtained under the Public Demands Recovery Act, is governed by this article, and not by art. 14. 1 C.W.N. 516.

A.—Applicability of article.

1.—Suits for pre-emption.

A.—Suits in respect of mortgages :—

- (1) Where a usufructuary mortgagee purchases the property mortgaged under an unregistered sale-deed, a suit for pre-emption would be governed by this article, and not by art. 10. 160 P.R. 1889.
- (2) Where a mortgagee decree-holder obtained possession of the property, the period of limitation would, in a pre-emption suit in respect of it, be calculated from the expiry of the six months' grace allowed to the mortgagor after the decree for foreclosure, if this article be applicable to the case. 14 C. 761.
- (3) A suit for pre-emption based upon a mortgage is governed by this article, and not by art. 10. 108 P.R. 1885.

B.—Suits in respect of mortgages by conditional sale :—

- (1) A suit for pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is governed by this article, where the subject is not capable of physical possession and there is no registered deed of sale, and not by art. 10. 24 A. 17 (P.C.) = 5 C.W.N. 888; 14 A.W.N. 49; 4 A. 218 = 2 A.W.N. 28 (F.B.); 5 A. 187 = 2 A.W.N. 212.

Compare 1 A.W.N. 66 = 3 A. 770; 2 A.W.N. 97 = 4 A. 291.

- (2) In such a case, limitation begins to run from the expiration of the year of grace, that being the period when the mortgagee's right becomes mature. 24 A. 17 = 5 C.W.N. 888 (P.C.); 3 A. 770 = 1 A.W.N. 66; 5 C.W.N. 888 = 24 A. 17 (P.C.), approving 1 A. 311 (F.B.); 14 A. 405 (F.B.) = 12 A.W.N. 108 (overruling 4 A. 414 = 2 A.W.N. 83 and 8 A. 54 = 5 A.W.N. 880); 2 N.W.P.H.C. 284. Compare 4 A. 291 = 2 A.W.N. 87.
- (3) Where a mortgage by conditional sale becomes an absolute sale by reason of a foreclosure decree, a suit for pre-emption may be brought under this article within six years from the date of the order absolute and constructive possession given thereunder. 7 O.C. 8 & 8 O.C. 184 (B).
- (5) In a suit for pre-emption in respect of a mortgage by conditional sale, the pre-emptor's full right to impeach the sale does not accrue until a decree declaring the conditional sale absolute and giving him possession. 8 A 54 = 5 A.W.N. 380.
- (6) Where a mortgage by conditional sale had been duly foreclosed and at the expiration of the year of grace a portion of the mortgage-money remained unpaid, held, in a suit for pre-emption of the mortgaged

A.—Applicability of article.—(continued).

1.—Suits for pre-emption—(continued).

property, the cause of action arose from the expiration of such year of grace, when the conditional vendee's title became absolute. 14 A. 405=12 A.W.N. 108.

- (7) A suit to enforce a right of pre-emption, against the heir of a mortgagee by conditional sale, who has foreclosed, is governed by this article, where the subject of sale does not admit of physical possession and there is no registered deed of sale; and limitation runs from the date of the expiry of the year of grace. 24 A. 17 (P.G.)=5 C.W.N. 888.
- (8) A claim to enforce a right of pre-emption, in the case of a mortgage by conditional sale, not accompanied with possession, accrues when the mortgagee, after foreclosure, gets a decree for possession, and is governed by this article. 4 A. 414=2 A.W.N. 88.
- (9) In——the period of limitation begins on the date of the order absolute for foreclosure under S. 87 of the Transfer of Property Act, and not on the date fixed by the decree for payment. 20 A. 375.
- (10) Where a mortgage contains a covenant that, on default of payment within a certain time, the mortgage should become a sale absolute, and a foreclosure-decree is obtained thereon, a suit for pre-emption in respect of such property would be governed by this article and not by art. 10. 37 P.R. 1894.

C.—Sale of share of *shamilat* :—

Where the whole of the property sold does not admit of physical possession, a share of *shamilat* being included, and where the sale is not effected by means of a registered deed, a suit for pre-emption would be governed not by art. 10, but by this article. 30 P.R. 1893.

D.—Sale of undivided share in joint holding :—

A suit for pre-emption of an undivided share in a joint holding, which does not admit of physical possession being taken, and in which the purchaser acquires his title by foreclosure proceedings under Regulation XVII of 1806 and a subsequent suit for possession, is not governed by art. 10 but by this article. 30 P.R. 1892.

E.—Suit between rival pre-emptors :—

A suit, not for enforcing any right of pre-emption against the vendee, but for establishing the superiority of the right of one rival pre-emptor over that of another, is not governed by art. 10 but by this article. 11 P.R. 1893; 7 A. 167=4 A.W.N. 315.

F.—Sale of undivided share :—

- (1) A suit for pre-emption in respect of a conditional sale of an undivided share of an estate, would be governed by this article, and not by art. 10, as an undivided share cannot admit of physical possession. 37 P.R. 1893.
- (2) A——in respect of a share in an undivided *Zemindari*, incapable of physical possession, is governed by this article, and not by art. 10. 7 O.C. 1.

A.—Applicability of article.—(*continued*).1.—Suits for pre-emption.—(*concluded*).

G.—Sale under unregistered deed :—

- (1) Where the land sold does not admit of physical possession and the sale-deed is not registered, a suit for pre-emption is not governed by art. 10, but by this article. 1 P.L.R. 45.
- (2) Where the land sold does not admit of physical possession and the sale deed is not registered, a suit for pre-emption is not governed by art. 10, but by this article. 14 P.L.R. 1904.

H.—Adding new defendant after time :—

Where, in a suit for pre-emption, the vendee, from the original vendee, is added as co-defendant after the period of limitation has elapsed, the suit must be dismissed, unless the second sale can be proved to be fictitious. 25 P.R. 1903 = 74 P.L.R. 1903.

I.—Sale of property subject to usufructuary mortgage :—

Where property in possession of the mortgagee thereof was sold, a suit against the purchaser for pre-emption would be governed by this article and not by art. 10, the right to sue accruing when the property was sold. 90 P.R. 1886.

J.—Miscellaneous :—

Where a certain share of the property decreed was transferred in favour of the defendant by virtue of an agreement between the decree-holder and the defendant, a suit to pre-empt that share is governed by this article and not by art. 10. 3 A.W.N. 6.

2.—Declaratory suits.

A.—Suit for declaration of title to land :—

- (1) *Quære*.—Is a suit for a declaration of title to land governed by the limitation of six years or by that of twelve years? 19 W.R. 82.
- (2) This article is applicable to a suit for a mere declaration without consequential relief. 6 C.P.L.R. 53.

B.—Declaration of invalidity of a Hindu marriage :—

A suit by a Hindu woman for a declaration that an alleged marriage of her daughter with the defendant was null and void, is cognizable by the Civil Courts. 14 W.R. 408.

C.—Suit by Parsi to declare marriage void :—

A suit by a Parsi to have her marriage celebrated in her infancy, declared void, is governed by this article, and limitation runs from the date of her attaining majority, *i.e.*, twenty-one. (Parsi Marriage and Divorce Act, XV of 1865). 22 B. 430.

D.—Suit for declaration of title and confirmation of possession :—

A suit for declaration of the plaintiff's title to, and confirmation of, his possession of the plaint property and to set aside an order passed under the Land Registration Act concerning the plaint property is governed by this article, the prayer to set aside the order of the revenue authorities being a surplussage. 10 C. 525.

A.—Applicability of article—(*continued*).

2.—Declaratory suits—(*continued*).

E.—Suit for declaration of right to have land registered:—

A suit by the purchasers of certain land to obtain a declaration of their right to have the land registered in their name in the revenue records, is not governed by art. 144, and would be in time if brought within six years from the date of assertion or denial of the right. 19 B. 43.

F.—Declaratory suit—Attachment under Criminal Procedure Code:—

A suit for declaration of title to immoveable property, under an attachment under S. 146 of the Code of Criminal Procedure, and for profits therefrom, is governed by this article. 26 M. 410.

G.—Declaratory suit—Vatan:—

A suit for a declaration of the plaintiff's right to a vatan.

Per Melville, J.—Six years' rule applied under cl. 16, S. 1, Act XIV of 1859.

Per Nanabhai Haridas, J.—Twelve years' rule applied under cl. 12, S. 1, Act XIV of 1859. 2 B. 120.

H.—Suit for correction of settlement record and for declaration of title:—

Where, in a suit for correction of settlement record, it was alleged that the defendant challenged the plaintiff's title to the land in dispute, though the suit was barred by limitation so far as the prayer for correction of settlement record was concerned, *held*, the Court should have tried and decided the question of plaintiff's proprietary title and have given him a decree declaratory of such title, if it were proved. 27 P.R. 1881; 35 P.R. 1880.

I.—Suit for establishment of periodically recurring right and for property:—

Where a suit for the establishment of a periodically recurring right carries with it a claim for a further right, *viz.*, the right to the property itself, this article would apply and not art. 181. 10 C. 697.

J.—Declaratory suit—Remission of revenue:—

A suit for a declaration of the right to certain yearly remissions of revenue is not governed by art. 181 but by this article. 16 M. 294—3 M.L.J. 98.

K.—Suit for declaration of right and possession:—

This article governs a suit for a declaration of right to, and of, actual possession in immoveable property, where the suit falls under no other article. 20 A. 35—17 A.W.N. 193.

L.—Cancellation of Deed—substantial relief:—

Where the substantial relief sought is the cancellation of an instrument or a declaration of its invalidity, and recovery of land is only an auxiliary or incidental relief, the suit will be one under S. 39 or S. 42 of the Specific Relief Act, and will be governed by art. 91 or by this article for purposes of limitation. 25 A. 1 (P.C.)—4 Bom. L.R. 882—6 U.W. N. 849.

A.—Applicability of article—(continued).

2.—Declaratory suits—(continued).

M.—Declaratory suit barred—Arrears barred :—

If the claim for a declaration of title to certain allowance were barred, the claim for arrears would also be barred. 15 B. 135.

N.—Declaratory suit—Heirship :—

Suit for a declaration of heirship will be in time if brought within six years from the date of denial of title. Cause of action does not accrue from the date of the death of the previous owner. 15 B. 422.

O.—Suit for declaration and for accounts :—

A suit for a declaration, that the plaintiff is a partner with the defendant and that, if the partnership be found subsisting, accounts might be taken, is governed by this article and not by art. 100. 2 A.W.N. 87.

O₁.—Declaration of under-proprietary right :—

A suit for——— is governed by this article. 8 O.C. 30.

O₂.—Suit for declaration and to clear a cloud on title :—

A——— is governed by this article and not by art. 144. 1 C.L.J. 73.

P.—Miscellaneous suits for declaration :—

- (1) A suit by a purchaser, who alleged himself to be in possession of the land purchased by him, for a declaration of his title to the land against the defendant, who disputed his title thereto, would be governed by this article, and limitation would begin to run when the defendant did the first act prejudicial to plaintiff's title, if the latter had been in possession as proprietor. 88 P.R. 1882.
- (2) A suit for possession and mesne profits or to declare that the defendant was a mere lessee and was liable to be ejected, must be brought within six years from the date when plaintiff had constructive knowledge of the denial of his right and assertion of an adverse title in defendant. 3 O.C. 55.
- (3) Where the defendant is in possession of land under a lease, a suit for a declaration that the lease is not binding on the plaintiff would be governed by this article. 27 B. 515 (583).
- (4) A suit for a declaration of the plaintiff's absolute right and title to certain premises and for delivery to her of title-deeds relating to these premises was governed by cl. 16, S. 1, Act XIV of 1859. 6 M.H.C. 455.
- (5) The statute of limitation was inapplicable to a claim for a declaration of title, where the plaintiff was in possession of the land to which the declaration was required. 7 W.R. 96.
- (6) Suit for a declaration that an order of forfeiture under S. 158 of the Bombay Land Revenue Code, Act V of 1879, is illegal, is governed by this article. 16 B. 455.
- (7) A suit for a declaration that defendant purchased certain property *bonafide* for plaintiff is governed by this article. 25 C. 49—2 C.W.N. 76.

A.—Applicability of article—(continued).

2.—Declaratory suits—(concluded).

- (8) A suit by an attaching creditor for a declaration that a certain decree is collusive and not binding on him and that he is entitled to sell certain property attached by him in execution of his decree, is governed by this article, and not by art. 11. 18 C.L.R. 189.
- (9) When the notice of ejectment given by the plaintiff to the defendant was cancelled as bad in form, the cause of action for a suit against the defendant to declare that the latter had no right as proprietor or under-proprietor in the land arose on the day on which the notice of ejectment was cancelled. 6 O.C. 142. See, also, 2 O.C. 79 (B).
- (10) A suit to have it declared that defendant was an ordinary tenant, the defendant having no notice of ejectment set up under proprietary tenancy and the Revenue Court having cancelled the notice on the ground that the defendant was more than an ordinary tenant, is governed by this article, limitation running from the date of the order of the Revenue Court cancelling the notice of ejectment. 7 O.C. 187.
- (11) Where the defendants, taking advantage of an entry in the Revenue papers in their favor, were trying to oust plaintiffs from their lands, and the latter brought a suit for a declaration of their title, the suit was held to fall under S. 42 of the Specific Relief Act and to be governed by this article. 20 P.R. 1900=1 P.L.R. p. 100.
- (12) A suit for a declaration that the plaintiff was the *Uralan* of a *devasom* for the delivery of the *devasom* properties and for accounts by the defendant, who had denied the *uraina* right of the plaintiff's predecessor in a suit, brought more than twelve years before the institution of the present suit, held barred by limitation either under this article or art. 144. 3 M.L.J. 214 =16 M. 456.

3.—Suits by reversioners.

(1) Suit by minor reversioner :—

A minor plaintiff, instituting a suit falling under this article, is not excluded from the benefit of s. 7 of the Act simply because the right of some other person (through whom he does not claim) to sue for a similar relief is barred. 22 A. 33 (F.B).

(2) Suit by person not presumptive reversioner :—

A suit by a person, who is not the presumptive reversioner at the time, for setting aside an alienation made by the widow, is governed by this article and not by art. 125. 14 M.L.J. 209; 10 M.L.J. 229.

(3) Suit by reversioners to a Malabar stanom :—

A suit by the reversionary heirs to a *stanom* in Malabar, for a declaration that a *kanom* executed by the present holder of the *stanom* was not binding on them or on the *stanom*, is governed by this article and not by art. 91. 16 M. 138.

A.—Applicability of article—(continued).

3.—Suits by reversioners.—(concluded).

(4) **Suit by reversioner for moveables:—**

Suit by a reversioner to recover moveable property, on the death of a female, is governed by this article, and limitation begins to run from the death of the female. 23 B. 725 (P.C.)=1 Bom. L.R. 607.

(5) **Alienation by widow:—**

(a) A suit, by a reversioner to declare that a certain alienation made by the widow is void, must be brought within six years from the date of conveyance. 10 B.H.C.A.C. 351.

(b) A suit by a reversioner for a declaration of his title to property sold in execution of a decree against a Hindu widow is governed by this article, and the cause of action arises when the property is sold and the widow is dispossessed. The suit for declaration must be brought within six years from the date thereof. 14 B. 512.

(6) **Suit by reversioner—property not alienated by widow:—**

(a) A suit by a presumptive reversionary heir praying for a declaratory decree that he is entitled to succeed, on the widow's death, to property not alienated by the widow, but in the possession of persons claiming adversely to the widow, is governed by this article and not by art. 125. 26 M. 488.

(b) A suit by reversioners, after the death of the widow of a testator, for the construction of his will and codicil and for declaration of their rights, would be in time if brought within six years from the death of the widow. 20 C. 906.

(7) **Alienations by sonless proprietor:—**

(a) A suit by a reversioner, for a declaration that an alienation made by a sonless male proprietor, is not binding on his reversionary interests, brought during the life-time of the proprietor, is governed by this article, and not by art. 91. 19 P.R. 1883.

(b) A suit by a reversionary heir, for a declaration that a mortgage effected by the proprietor on his land is not binding on his reversionary interest, is governed by this article, the right to sue accruing on the date when the mortgage was created. 111 P.R. 1884.

(c) A suit by a reversioner, for a declaration that an alienation made by a childless proprietor will not bind his interest, is governed by this article and not by art. 91. 93 P.L.R. 1903=56 P.R. 1903 (F.B.); 58 P. L.R. 1901.

(d) Where a right to sue by a reversioner, to have an alienation made by a sonless proprietor declared void, was barred under the Limitation Act, before the Punjab Limitation Act came into force, it cannot be revived by the operation of the latter Act, which was in force at the date of the institution of suit. 39 P.R. 1901.

(e) Where a daughter's suit, to have an alienation by her mother, a widow, set aside, was withdrawn on the ground that the alienation was valid, a suit by the daughter's son within six years from the withdrawal held not barred, the withdrawal giving a fresh cause of action. 25 M. 731.

A.—Applicability of article—(continued).

4.—Suits against Hindu son to enforce father's debts.

- (1) The cause of action for a suit against the sons, to pay their father's debts, arises on the same day as it does against the father, and the same limitation applies against both of them. 10 M.L.J. 248.
- (2) Where, for price of goods sold and delivered to a Hindu father, a suit is brought against the father or the son, on the original cause of action itself, art. 53 would apply; but if, after a decree obtained against a deceased undivided Hindu father, a suit is brought against the son, for enforcing the decree as against family property in his hands, this article would apply. 27 M. 243=14 M.L.J. 84.
- (3) Where a personal decree, payable by instalments, was obtained against a Hindu father and his two sons, a suit against his other sons to recover the instalments then due from the ancestral property in the latter's hands was governed by this article, and time began to run from the date when each instalment would have become due from the deceased father. 17 M. 122=4 M.L.J. 52.
- (4) A suit to enforce, against a Hindu son, a decree obtained against his father on the ground of the pious obligation of the son to pay a debt due by the father, is governed by this article, there being no other article specifically applying to such a case. 16 M. 99=8 M.L.J. 1.
- (5) A suit against the son to enforce the liability to pay the father's debt will be in time if brought within six years when the bond became payable or when the cause of action accrued. 23 A. 206 (following 15 A. 75 and referring to 23 M. 292 (F.B.) and 16 M. 99). The latter case dissented from as to the *terminus a quo* of limitation.

5.—Suits relating to pledges.

Suit for sale of pledged property—Personal remedy:—

Where the plaint prays for sale of the property pledged and also for a personal remedy against the defendant, the suit will, so far as the former remedy is concerned, be governed by this article and by art. 57 as regards the latter remedy. 116 P.R. 1881; 22 C. 21; 17 A. 284=15 A.W.N. 46; 27 M. 528 (F.B.)=13 M.L.J. 445; 24 A. 251 (252).

6.—Suits for injunction.

- (1) A ————under S. 54 of the Specific Relief Act, not being specially provided elsewhere in this Act, is governed by this article. 13 M. 445.
- (2) The limitation for a suit for an injunction restraining defendant from infringing a trade mark is six years from the date of accrual of cause of action. L.B.R. 113 (1903), referring to 13 M. 445.
- (3) A suit by a lessor for an injunction to restrain the lessees from interfering with the lessor's rights under a covenant in the lease to enter upon the land demised and cut and take away certain trees, is governed by this article. 26 A. 391.
- (4) Where a lessee, under a registered lease, dug a tank without the lessor's permission as required in the lease, a suit to compel him, the lessee, to fill up the tank or for compensation would fall under this article. 6 C. 84=6 C.L.R. 569.

A.—Applicability of article—(*continued*).

7.—Suits for contribution.

- (1) Where a part of the money, and not the whole, due under a joint decree, was realized from the plaintiff by process of Court and paid over to the decree-holder, a suit for contribution against the other judgment-debtor is governed either by this article or art. 61, the cause of action accruing from the date of payment to the decree-holder and not from the date of the realization of the money by the Court. 20 M. 23.
- (2) Where a plaintiff, after getting a decree against one defendant for contribution, found it impossible to realise the amount from that defendant and brought a suit against the other defendants to recover the deficit, the suit was *held* governed by this article. 1 P.L.R. p. 149.
- (3) Where, in execution of a joint decree against the plaintiff and defendant, the property of the plaintiff alone was sold, it was doubted whether art. 100, Act IX of 1871, corresponding to art. 99 of the present Act or 118=120 of the present Act was applicable to a suit by the plaintiff for contribution against the defendant. 4 C. 529.
- (4) A suit, based upon a covenant in an *ekranamah*, for contribution in respect of a debt which had been realized by the sale of the property mortgaged by plaintiff's father, was *held* to fall under this article, the cause of action arising when the plaintiffs were damnified (*i.e.*) when they were obliged to pay and did pay the mortgage-debt. 26 C. 241.
- (5) A suit for contribution against co-trustees is not governed by art. 100, but by this article. 20 M. 399.

8.—Suits for damages.

- (1) Where land acquired under the Land Acquisition Act had been taken possession of by Government before an award, a suit for damages for Collector's refusal to make an award is governed by this article. 27 M. 535=14 M.L.J. 173.
- (2) A suit brought under s. 3, Act X of 1836, by an indigo planter against an instigator, who had successfully prevailed upon the ryots to break the contract entered into with the plaintiff, for damages to the extent of the injury sustained, was governed by cl. 16, s. 1, Act XIV of 1859. 5 W.R. 277; 8 W.R. 257; 7 W.R. 401.
- (3) A suit to recover damages for loss caused by carrying off a quantity of unthreshed paddy from the plaintiff's threshing-floor, was governed by the six years' limitation. 3 M.H.C. 165.
- (4) A suit to recover damages for cutting and carrying away crops is a suit to recover the value of the crops, and, as such, is governed by this article and not by art. 49. 17 W.R. 277 (Note). This case is practically *overruled* by 25 C. 692 (F.B.)=2 C.W.N. 265.
- (5) A suit to recover damages caused by wrongful deprivation of property is governed by this article and not by art. 49. 10 B. H.C.A.C. 346.

A.—Applicability of article—(continued).

9.—Suits relating to mortgages.

(1) Mortgagee's claim for mortgage-money :—

A claim by a mortgagee for recovery of the mortgage-money, on the ground of the mortgagor's failure to secure possession to the mortgagee, is not governed by art. 97, since the liability is not one arising under the common law but one imposed by s. 68 of the Transfer of Property Act. To such a case, this article or art. 116 would apply. 21 M. 242=8 M.L.J. 81 (*distinguishing* 11 B. 475 on the ground that, when the case was decided, the Transfer of Property Act was not in force in Bombay).

(2) Mortgage containing no covenant to pay :—

In the case of a usufructuary mortgage containing no covenant to pay, the right to sue for mortgage amount arises when the security is wholly or partially destroyed. This article applies to such a suit. 2 U.B.R. (1897-01) 518.

(3) Suit by mortgagee for sale :—

Where a usufructuary mortgagee was not given possession of the mortgaged property, *held*, that a suit by him to recover money by sale of the mortgaged property would not lie and was barred by limitation, the suit having been instituted more than six years from the date of mortgage. 8 M.L.J. 154 (F.B.)

(4) Personal remedy on mortgage-deed :—

There is no separate cause of action to enforce a personal covenant in a mortgage-deed; the cause of action for both remedies is one and the same and accrues when the covenant to pay is broken. 20 A. 512.

(5) Suit to recover mortgage-amount charged on surplus sale-proceeds :—

A———in consequence of the mortgaged property being sold free from incumbrances for Government revenue, is governed by this article or art. 132. 27 C. 180.

10.—Suits relating to trusts.

(1) Suit to vindicate trustee's personal rights :—

A———to manage a trust and for possession of the trust properties is governed by art. 123 or 145 or by this article. 6 A. 1(P.C.)=13 C.L.R. 39=10 I.A. 90.

(2) Suit re equitable claim against trustee :—

A suit relating to an equitable claim against a trustee liable to account, in which the relief sought is to have an account taken of the trust property and to recover whatever might be due falls under this article. 7 A. 25=4 A.W.N. 219.

(3) Suit by assignee of decree-holder :—

Where the judgment-debtor's money in the hands of a trustee was attached in execution of a decree, a suit by the assignee of a decree-holder to recover the money was governed by this article. 11 A.W.N. 130.

A.—Applicability of article—(*continued*).

10.—Suits relating to trusts—(*concluded*),

(4) **Suit to eject assignee of endowed property :—**

A suit by a person interested in endowed property for dispossession of the assignee of the last manager is governed by this article, time beginning to run from the date of the alienation. 9 P.R. 1904; 8 P.R. 1899.

(5) **Suit to follow estate of debtor :—**

A suit by the plaintiffs to follow the estate of their debtor in the hands of the defendant and for declaration that a mortgage in favour of the defendant is void, as against the creditors of that debtor, is governed by this article and not by s. 10. 4 C. 897=4 C.L.R. 193.

(6) **Suit to recover property settled on invalid trusts :—**

Under this article the right to recover property settled on invalid trusts accrues directly the property is conveyed to the trustees. 20 B. 511.

(7) **Claim in respect of breach of trust :—**

A suit in respect of breaches of trust committed more than six years before the institution of the suit is barred by limitation. 20 M. 398.

11.—Suits between principal and agent, &c.

(1) **Suit by principal against agent :—**

A suit by a principal against his agent, who denies the agency, to recover the amount that may be found due to him is governed by this article, the cause of action accruing on the date when the agency ceased. 14 C. 147 (P.C.)

(2) **Suit against representative of agent for account :—**

Whether this article or art. 62 applied, a suit instituted within three years from the date of the agent's death, against the representative of the agent for an account of money received by the agent, is within time, the cause of action arising from the date of the death of the agent. 96 P.R. 1886.

(3) **Suit for account of stewardship :—**

If the object of a suit is not to recover any property in *specie*, but to have an account of the defendant's stewardship, it must be brought within six years from the time when the plaintiff had first a right to demand it. 5 C. 910=6 C.L.R. 195.

(4) **Suit against son of a pleader for money paid to pleader :—**

A suit against the son of a deceased pleader to recover money paid by a client to him in his professional capacity will be in time, if brought within six years from the date of receipt by the pleader. 25 A. 55.

(5) **Suit by purchaser of decree against judgment-debtor's agent :—**

A suit by the purchaser of a decree to recover money of deceased judgment-debtor in the hands of his agent is governed by this article. 13 A. 368=11 A.W.N. 130.

A.—Applicability of article—(continued).

11.—Suits between principal and agent, &c.—(concluded).

(6) Suit by vakil against client's agent:—

A suit by a vakil against his client's agent, for the recovery of money paid by him to be delivered to his clients but not delivered, would be governed by this article, the cause of action arising from the date the plaintiff is compelled to pay money which the defendant was legally bound to pay. 2 M.H.C. 21.

(7) Suit for account against executor:—

A suit not to follow trust property in the hands of a representative of a trustee, but one to ascertain whether any trust remained to be administered after the payment of the testator's debt and funeral expenses, or merely for an account against the executor or his representative, is governed by this article, and not by article 10. 10 B. 242.

(8) Suit against receiver:—

Art. 89 is inapplicable to a suit to recover money in the hands of a Receiver appointed in execution of a decree. Such a suit is governed by this article. 3 O.C. 171.

12.—Suit for restitution of conjugal rights.

Restitution of conjugal rights:—

(1) A suit for——between Hindus is governed by this article read with s. 23 of this Act. 13 A. 126=11 A.W.N. 18. (See, further, same case noted at top of p. 743, *supra*).

(2) See 28 C. 37 (45), where the applicability of this article to a suit for restitution of conjugal rights has been discussed.

13.—Miscellaneous Suits.

(1) Suit by dispossessed non-occupancy raiyat:—

Where a non-occupancy raiyat was dispossessed from his holding, otherwise than in execution of a decree, a suit by him to recover possession would be governed either by this article or by art. 142. 31 C. 647.

(1-a) Articles sold in retail:—

A suit to recover the value of articles sold by retail and supplied for household purposes would be governed by art. 52, and not by this article. 7 W. R. 101.

(Note).—This was a case under Act XIV of 1859.

(2) Suit for cancellation or modification of certificate of rent:—

A———will fall under this article or art. 14. 28 C. 676.

(3) Suit to avoid Butwara proceedings:—

A———of a Collector, is governed by this article and not by art. 45. 16 W. R. 271.

A.—Applicability of article—(continued).

13.—Miscellaneous Suits—(continued).

(4) Suit by real owner against recipient of money :—

Where compensation-money was paid by Government to a certain person representing himself as the owner, a suit, by the real owner, for recovery of the same from the person to whom it was paid, *held* governed by art. 118, Act IX of 1871 (=art. 120 of this Act); and time begins to run in such a case from the date of payment of the amount to defendant by Government. 5 C. 597; 8 W.R. 23.

(5) Suit between co-sharers :—

A suit for possession of trees by some co-sharers of a village against the other co-sharers, and to set aside the order of the Settlement Officers made in favour of the defendants, is governed by this article and not by art. 14. 1 A.W.N. 91.

(6) Order not under Ss. 280-282 or S. 335, C. P. Code :—

Where the order, passed on a claim, was one passed under s. 269 of the old Code, and not one passed under s. 335 of the present Code, it was *held* that a suit (after Act X of 1877 came into force) for the establishment of the defeated claimant's title and for confirmation of possession, was governed by this article and not by art. 11. 9 C. 163; 11 C.L.R. 409; 11 C.L.R. 363.

(7) Suit for money had and received by defendant for plaintiff's use :—

A suit by a landlord for recovery of his share of compensation, allowed by Government for acquisition of land under Act X of 1870, the same being realised by the defendant-tenant, representing himself to be the owner, is governed by this article or art. 62, and not by art. 86. 3 C.W.N. 202.

(8) Suit by Mahomedan for share in inheritance :—

A suit by a daughter (Mahomedan) claiming a share, by inheritance, from her father's estate, alleged to be the joint family properties of herself and her brothers, was *held* barred by this article, when it was found that she had ceased to be a member of the alleged joint family since her marriage. Art. 127 *held* not to apply to such a suit. 7 C.W.N. 155.

(9) Suit by administrator against executor :—

A debtor, taking possession of the estate of his creditor as executor, is accountable for the amount of his debts to the estate as assets. A suit by the new administrator to recover, from the executor of the deceased debtor's estate, the property and effects of the deceased creditor, is governed by this article, the cause of action accruing from the death of such debtor-executor. 7 C.W.N. 476.

(10) Suit for money realized under decree since reversed :—

A suit to recover money realized in execution of decree, which was subsequently reversed on appeal, is governed by this article. 2 C.L.R. 354.

A.—Applicability of article—(continued).

13.—Miscellaneous Suits—(continued).

(11) Suit for removal of manager of temple:—

A suit for the removal of the manager of a temple, the removal of his control over the properties belonging to the temple, and for a declaration that the plaintiff is entitled to appoint another manager for the purpose of carrying out the object of the endowment, is governed by this article, and not by S. 10. 13 C.L.R. 39 (P.G.)—6 A. 1—10 I.A. 90.

(12) Suit to recover purchase money:—

(a) A suit to recover from the defendant the amount of purchase-money paid by the plaintiff upon a sale to him of certain land by the defendant's father, was governed by the six years' limitation. 4 M.H.C. 266.

(b) A—by purchaser against decree-holder, the judgment-debtor being found to have no saleable interest in the property sold, is governed by this article. 3 M.L.J. 134.

(13) Suit to recover advance:—

Where an agreement, executed before the Registration Law came into force, provided for the advance by plaintiff to defendant of moneys up to a certain limit on the security of certain bills, stocks &c., a suit to recover the amount so advanced was governed by the six years' rule under cl. 16, S. 1, Act XIV of 1859. 6 B.L.R. 668—15 W.R.O.C. 1.

(14) Suit by shebait's heir against debutter estate:—

A suit against a *debutter* estate to recover money advanced by the plaintiff's father, a *shebait*, to meet the expenses of the *debutter* estate, is governed by this article, the cause of action accruing from the date of the death of the plaintiff's father and not from the time the advances were made. 5 C.W.N. 273.

(15) Suit by holder, against acceptor, of Hundi:—

Under Act XIV of 1859, a suit by the holder of a *Hundi* against the acceptor was governed by cl. 16, and not by cl. 10, S. 1, of the Act. 4 W.R. 98.

(16) Suit by lessor against beneficial lessees:—

Where a lease was held *benamée* and the tenure passed away by sale in execution of a decree to a third party, a suit by the lessor to recover, from the beneficial lessees, the arrears of rent, was governed by the six years' limitation under cl. 16, S. 1, Act XIV of 1859. 18 W.R. 132.

(17) Suit for property—Dispossession by Magistrate:—

A suit by a person to recover possession of property, of which he was dispossessed by order of a Magistrate, brought more than three years after the Magistrate's order, was not barred under cl. 7, s. 1, Act XIV of 1859. 9 W.R. 480.

(18) Suit by some joint-tenants against others:—

A suit by some joint-tenants for compensation for use and occupation against the other joint-tenants for having had exclusive use and occupation of some of the joint lands, is governed by this article, and in such a suit, compensation for six years can be obtained. 23 C. 799.

A.—Applicability of article—(*continued*).13.—Miscellaneous Suits—(*continued*).

(19) Suit to recover residue of surplus sale-proceeds :—

A suit to recover the residue of the sale-proceeds of an estate sold for arrears of Government revenue is governed by this article and not by art. 62. 20 C. 51 (F.B.), overruling 18 U. 234.

(20) Suit to oust nominated shebait :—

A suit to oust a *shebait* from office, the appointment to which is made by nomination, is governed by this article and not by art. 124. 19 C. 776.

(21) Suit for mutation of names in registry :—

In a suit by a purchaser of a *Zamin* village against his vendor to compel the mutation of names in the register, the cause of action arises from the date of the Collector's refusal to register, negating the plaintiff's right to the village in question. 15 M. 350 = 1 M.L.J. 231.

(22) Suit by landlord for ejectment :—

Where the decision of the Survey Officer, declaring that the defendant was an occupancy tenant, was not brought to the notice of the parties until when the *botkhat* was framed and signed : *held*, in a suit for ejectment by the landlord, the limitation begins to run from the date of the *botkhat*, and not from the date of the Survey Officer's decision. 2 Bom. L.R. 228.

(23) Suit for recovery of security deposit :—

A suit to recover deposit made as security for the due discharge of certain office would be governed by this article ; and the period of limitation would begin to run, not from the date of plaintiff's dismissal from office, but from the time when the account of charges due against the deposit was made and sent in to him. 12 C. 113.

(24) Suit for apportionment of rent :—

Though a suit is instituted as one for abatement of rent, still if it really be for apportionment of rent, the six years' rule will apply, and S. 19 of Bengal Act VIII of 1869 would not. 11 C. 284.

(25) Suit to enforce equitable claims :—

A suit to enforce an equitable claim in respect of moveables wrongfully converted by a deceased person, against whom a decree had been obtained, such proceeds, being held by the defendant as agent of the representative of the deceased, is governed by this article. 10 C. 860 = 11 I.A. 59 (P.C.)

(26) Suit by auction-purchaser against lessee :—

A suit by an auction-purchaser of mortgaged property against a perpetual lessee, for declaration of the former's rights, and to set aside the lease on the ground of its being against a covenant in the mortgage-deed, is governed by this article, declaration of plaintiff's right being the substantial relief, and the other relief being merely a subsidiary relief. 22 A. 90, (*following* 16 A. 73).

A.—Applicability of article—(continued).

13.—Miscellaneous Suits—(continued).

(27) Suit against Mahomedan widow by other heirs:—

A suit by the other heirs of a Mahomedan to recover from his widow a sum of money realised by her on account of a mortgage-debt due to her deceased husband, falls under this article. and must be brought within six years of the date of realization. 19 A. 169=17 A.W.N. 34.

(28) Suit for maintenance of possession:—

A suit for maintenance of possession in certain joint family property, by cancellation of a deed of sale, executed by another co-parcener, affecting plaintiff's interest in the property, is governed by this article. 16 A. 73.

(29) Suit against trespasser:—

A suit against a trespasser, for removal of trees planted on a land belonging to a Zemindar, is governed not by article 32, but by this article, because a mere trespasser is not a person having any right to use property for specific purposes. 10 A. 634=8 A.W.N. 257.

(30) Suit for declaration that land is khoti:—

A suit for a declaration that certain lands were *khoti* lands and not *dhara* lands as decided by the Survey Settlement Officer, is not governed by art. 10, but by this article. 18 B. 244.

(31) Purchaser taking possession of partnership property:—

Where a decree-holder-purchaser took possession of the partnership estate sold in execution of a personal decree against a member of the partnership, a suit by the other members to wind up the partnership is governed not by art. 106, but by this article, the cause of action accruing from the date of possession by the purchaser. 4 A. 437.

(32) Suit against Municipal Committee:—

(a) A ——— for something not done under the Municipal Act, no compensation being claimed in such suit, is governed by this article, and not by the special period of limitation contained in the Municipal Act. 4 A. 339 (F.B.)

(b) So, also, a suit for a declaration of plaintiff's right to open a market in his land, and for an injunction restraining interference with such right. *Per* Stuart, C. J., in 4 A. 102=1 A.W.N. 148.

(33) Suit under S. 270 of Act VIII of 1859:—

A ——— (corresponding to S. 295 of the present Civil Procedure Code) held governed by art. 118 of the old Act corresponding to this article. 1 A. 333 (F.B.).

(34) Suit for recovery of money illegally realised:—

Per Stuart, C.J., and Spankie, J.—This article is applicable to a suit to recover money illegally realised from the plaintiff by the defendant under an illegal and improper order of a Court. 1 A. 333 (F.B.)

(35) Suit for money drawn out of Court:—

A suit to recover money drawn out of Court under a decree, since reversed, is governed by this article. 13 M. 437.

A.—Applicability of article—(*continued*).13.—Miscellaneous Suits—(*continued*).

(36) Suit to enforce lien for unpaid-purchase money :—

Held, that, in a suit by a vendor of equity of redemption in certain immoveable property to enforce his lien for unpaid-purchase money, it would be governed by this article, if the object of sale were not assumed to be immoveable property. 11 A.W.N. 180.

(37) Suit by heir against person in lawful possession of Government Pro-notes :—

A suit for a share of Government promissory notes by an heir, against one falsely professing to hold them under a will, is governed by this article. 12 M. 487.

(38) Suit on pro-note :—

A suit on a promissory note payable on demand at any time within six years from the date of its execution, is not governed by art. 73, but by this article. 6 M. 290.

(39) Suit for recovery of profession-tax :—

A suit for the recovery of instalments of profession-tax under the provisions of the Towns' Improvement Act, 1871, was governed by this article. 8 M. 124.

(40) Suit to recover office of Kurnam :—

A ——— and lands attached thereto is governed by this article. 2 M. 283 ; 6 M. H.C.R. 301.

(41) Suit to recover *tasdik* allowance :—

A suit for a declaration that the plaintiff, as Dharmakarta of a certain religious institution, is entitled to receive direct from Government a certain *tasdik* amount payable annually, is governed by this article and not by art. 181. 13 M.L.J. 267.

(42) Suit to recover immoveable property under award :—

A suit to recover immoveable property under an award is governed, either by article 144 as being a suit for possession of immoveable property, or by this article as being a suit to enforce an award for which no special period is prescribed by the schedule. 10 M.L.J. 208.

(43) Suit to recover profits of hereditary office :—

A suit to recover the profits of a hereditary office wrongfully withheld is governed by this article. 9 M.L.J. 163.

(44) Suit against *Mushavirs* of a mosque :—

A suit against the *Mushavirs* or directors of a mosque for a declaration that they were not entitled to carry on the management of the *masjid* and its property, for removing them from their position as directors, for an account being taken of moneys received by them and for directing them to make good such sums and also sums, which, but for their wilful default, they might have received is governed by this article and must be brought within 6 years from the date of cause of action. 18 B. 401.

A.—Applicability of article—(continued).

13.—Miscellaneous Suits—(continued).

(45) Suit for recovery of gharwara dues :—

A ——— is governed by this article and not by art. 182, the same not being *malikhana* or *haks*. 3 O.C. 208.

(46) Suit to recover money deposited in Government treasury :—

A suit to recover money deposited in a Government treasury is governed by the six years' limitation. 2 N.W.P.H.C. 379.

(47) Suit against Government :—

Where a Magistrate, by an order under the Criminal Procedure Code, awarded certain money to Government as part of money stolen from Government treasury, a suit against the Government to recover the amount so awarded *held* governed by this article, the defendant not having shown that any other article applied to the case. 59 P.R. 1888.

(48) Deposit of money by customer to banker :—

Art. 145 does not apply to a deposit, by a customer, of money with a banker to be placed to the customer's credit in account current. This article may apply. 74 P.R. 1882.

(49) Suit for correction of settlement record :—

Where the names of the defendants are entered in the settlement record as proprietors of certain land, a suit by the plaintiffs for amendment of the settlement record and the entry of their own names instead of the defendants', is governed by this article, the cause of action arising from the date when the record of rights was sanctioned under S. 20, Act XXXIII of 1871. 79 P.R. 1879.

(50) Suit by liquidator of Company for calls :—

A suit by the official liquidator of a registered Company to recover, from the share-holder, who had forfeited his share, money due by him in respect of unpaid calls on his share is governed by this article. 160 P.L.R. 1903.

(51) Suit for profits by a co-sharer against lambardar :—

A ——— is governed by this article. 10 C.P.L.R. 98.

(52) Son claiming share in father's proprietary right :—

A suit by a son claiming, as against his uncle's sons, a share in the proprietary rights conferred on his father at the settlement, is governed by this article and not by art. 127. 6 C.P.L.R. 40.

(53) Suit to recover money wrongfully paid to defendant :—

A ———, the plaintiff being entitled thereto, is governed by this article. 5 C.P. L.R. 9.

(54) Suit by unsuccessful decree-holder :—

Where the decree-holder, who is unsuccessful in the claim-proceedings, sues for a declaration that another decree, in execution of which the claimant

A.—Applicability of article—(*continued*).13.—Miscellaneous Suits—(*continued*).

got possession of the attached property, was fraudulent and collusive, the suit will be governed by this article. 13 C.L.R. 199.

(55) **First crop assessment made over by Government :—**

Where, the Government having directed certain ryotwari tenants to pay the first crop assessment of certain lands to the trustees of a religious institution instead of to the Government, the trustees sued the ryots for recovery of arrears personally against the ryots and as a charge on the lands, the suit was held not to be one for 'rent,' and was governed, for purposes of limitation, by this article and not by art. 110. 26 M. 730=13 M.L.J. 248.

(56) **Suit by purchaser at execution-sale :—**

A——for recovery of money paid by him for the purchase, on the ground of want of title in the judgment-debtor, is governed by this article and not by art. 62. 16 M. 361=3 M.L.J. 364.

(57) **Suit for compensation money :—**

In execution of his money-decree, a decree-holder attached some property. A claim was preferred and the property was released from attachment. The decree-holder, in a regular suit brought by him, obtained a declaration that the property belonged to the judgment-debtor. In the meantime, the property was taken up by Government for public purposes and the compensation-money was paid to the claimant. The decree-holder having attached and sold this amount as debt due to the judgment-debtor, plaintiff purchased the same and now sued the recipients of the amount from the Government. Such a suit was held not to be one falling under art. 62, but one under this article. 15 M. 382.

(58) **Suit by defeated claimant :—**

Where a suit by a person, against whom an order under S. 246 of Act VIII of 1859 was passed, for establishment of his right to the property in dispute and for confirmation of possession, was dismissed not on merits but for non-payment of costs for service of summons to defendant, a similar suit subsequently brought for the same relief would not be governed by art. 11 but by this article. 9 C. 163=11 C.L.R. 409.

(59) **Suit for ejectment and for removal of trees :—**

Where a suit for ejectment, by a landlord against his tenant, contains an alternative claim to compel the defendant to remove trees from the lands leased to him for agricultural purposes, this article would apply, and not S. 27 of Bengal Act VIII of 1869. 9 C. 147=12 C.L.R. 418.

(60) **Suit by Hindu son against widow for immoveable property :—**

A suit by the sons of a deceased person against his widow, for the recovery of immoveable property of the deceased in her possession, would be governed either by this article or art. 144, and not by art. 123. 5 C. 692=5 C.L.R. 505.

A.—Applicability of article.—(continued).

13.—Miscellaneous Suits—(continued).

(61) Suit for compensation-money :—

Where the alienee from a widow received the compensation-money under the Land Acquisition Act, in deposit with the Government, a suit by the reversioner to recover that amount from the alienee would be governed by this article and not by art. 62. 5 C. 597=5 C.L.R. 45.

(62) Suit for turn of worship :—

A suit for a turn in the worship of an idol was governed by this article. 4 C. 688.

(63) Suit by Inamdar for rent against tenant not let into possession :—

Where the defendant was not placed in possession of the lands held by him, either by the Inamdar of the village or his predecessor in title, a suit by the Inamdar for arrears of rent would be governed by this article and not by art. 10. 25 B. 556.

(64) Suit between co-sharers :—

A suit by some co-sharers of a village against the other co-sharers for possession of trees and to set aside the order of the Settlement Officer made in favour of the defendants, is governed by this article. 1 A.W.N. 114.

(65) Suit by liquidator for calls :—

Suit by liquidator for calls is governed by this article, while the suit by the Company itself is not. 10 B. 483.

(66) Suit by Inamdar against Khatedar :—

This article is applicable to a suit by an Inamdar to recover arrears of assessment due from a *khatedar*. 6 Bom. L.R. 423.

(67) Suit for cancellation of instrument :—

Where, in a suit by a landlord against a tenant for the cancellation of an instrument, under which the latter purports to hold his tenement, the recovery of possession of the tenement is put in as a consequential relief, the suit would be governed either by art. 91 or this article, as it would come within S. 39 or 42 of the Specific Relief Act. 4 Bom. L.R. 832 (P.C.)

(68) Suit under S. 21 of Act I of 1880 (Bombay) :—

This article governs a suit under S. 21 of Bombay Act I of 1880. 3 Bom. L.R. 420.

(69) Suit by Inamdar against inferior holders :—

A suit by the plaintiff-Inamdar against inferior holders, to recover arrears of assessment in respect of lands held by them, is governed by this article and not by art. 110, as the suit is not for rent against the tenants. 3 Bom. L.R. 135.

A.—Applicability of article.—(concluded).

13.—Miscellaneous Suits—(concluded).

(70) Suit to recover value of repairs :—

Where there is no express agreement as to the payment for the repairs of a bungalow. *held*, that, on the performance of the repairs, an implied contract to pay their value arose, for which the period of limitation was six years. 9 B. H.C.A.C. 280.

(71) Suit for arrears of *deshmukhi vatan* :—

The period of limitation to recover arrears of *deshmukhi vatan* is six years. 8 B. H.C.A.C. 107.

(72) Suit to establish right to *toda-garas* :

A suit to establish a right to a *toda-garas* allowance and for arrears of the same, must be brought within six years, as *toda-garas* must be presumed to be moveable property. 4 B. H.C.A.C. 189.

(73) *Merais* or customary dues :—

A suit to recover *merais* or customary dues on account of a *Chattram* is governed by this article and not by art. 110, as *merai* is not 'rent' and the claim does not arise out of a relationship of landlord and tenant. 16 M. 305.

(74) Suit for possession of office :—

A suit for possession of office is governed by this article. 26 M. 118.

(75) Claim by contributors for distribution :—

A claim by some of the contributors to a common fund for a distribution of the same is governed by this article. 23 M. 583.

(76) Suit for emoluments of hereditary office :—

A suit to recover money due by custom as an emolument of an hereditary office is governed by this article, as it is not one for the possession of an interest in immoveable property. 22 M. 351.

B.—Article inapplicable.

Suit by a member of a joint Hindu family :—

A——against another, after separation, for realisation of the former's share in moneys collected under a bond executed in the latter's name alone, is governed by art. 62 and not by this article. 6 A. 442=4 A.W.N. 154.

A.—Suits for declaration.

(1) Suit for declaration :—

(a) A suit for a declaration that an order by a District Judge appointing the defendant as a member of a temple committee is illegal and invalid, is not governed by this article, but by art. 13. 8 M.L.J. 128.

(b) A suit by a defeated claimant to declare his right to attached property is governed by one year's limitation and not by this article. 11 C.L.R. 595. See, also, 8 C.L.R. 54.

B.—Article inapplicable—(continued).

A.—Suits for declaration—(concluded).

(c) A claim to a declaratory decree as to the erroneousness of an order under S. 321, Criminal Procedure Code, permitting the defendant to erect a drain-pipe to take water from plaintiff's reservoir, was governed by the twelve years' limitation. 17 W.R. 281.

(d) A ——— of the plaintiff's right to recover a moiety of the offerings made at a shrine is governed by art. 131 and not by this article. Even if this article applied, the particular suit was *held* to be in time, having been brought within six years of the first refusal, when the cause of action arose. 3 O.C. 951 (357) (B.)

(2) Suit for declaration of proprietary right :—

A ——— to land in plaintiff's possession free from liability to pay rent is not governed by this article, such a suit being one substantially for possession of immoveable property. 3 A. 40.

(3) Substantial prayer, declaration of title :—

In a suit for a declaration that the members of a *Nambudri Illom*, to which the plaintiffs belonged, were the sole heirs and successors of another *Illom*, and for the possession of certain land, the property of that *Illom*, it was found that plaintiff's *Karnavan* had been adopted into that *Illom* and both the *Illoms* had been amalgamated by a *Kavar* executed by the wife of the last male member of that *Illom* and that she had died less than twelve years before the suit. *Held*, the suit was not governed by art. 91 nor by this article, and was not barred by limitation. 15 M. G.

(4) Suit for declaration and possession :—

A suit by a defeated claimant to establish his right to the property in dispute and recover possession of the property, is governed by twelve years' limitation. 9 C. 230=12 C.L.R. 139.

B.—Suits for contribution.

Suit for contribution :—

(a) This article is inapplicable to suits for contribution, art. 99 being applicable to such suits. 7 A.W.N. 128.

(b) This article does not apply to a suit for contribution in a case where the amount was realized by sequestration or sale of the property of the person seeking contribution. *Per Bhaahyam Ayyangar and Moore, JJ.*, 26 M. 686 (F.B.)

C.—Suits for pre-emption.

(1) Mortgage to ripen into a sale :—

Art. 10 is not restricted in its operation to sales having immediate effect. A conditional sale ripening into an absolute sale will fall within art. 10, and not within this article, if the whole of the subject of the sale admits of physical possession. 76 P.R. 1895.

B.—Article Inapplicable—(*continued*).C.—Suits for pre-emption—(*concluded*).

(2) Suit for pre-emption :—

(a) A suit by a landlord to enforce a right of pre-emption over absolute occupancy fields is not governed by this article, but by art. 10. 6 C.P.L.R. 67.

(b) A claim for pre-emption is a claim in respect of a sale and is governed by art. 10 and not by this article, even where the sale-deed does not correctly describe the property sold. 1 A.L.J. 247.

(3) Suit by pre-emptor for money paid :—

Either this article or art. 97 would govern a suit to recover money paid by a pre-emptor under a decree for pre-emption which afterwards became void, the cause of action arising on the date the decree became void. 8 A. 273—6 A.W.N. 95.

D.—Suits for accounts.

(1) Suit for account and for money found due :—

Article 89, and not this article, is applicable to a suit by a principal against an agent for an account and for money that may be found due upon such account being taken. 8 C.W.N. 118.

(2) Suit by ward against guardian :—

(a) Art. 62, and not this article, is applicable to a suit by a ward against the guardian to recover specific sums received during plaintiff's minority, such a suit not being one for an account. 56 P.R. 1883.

(b) If the suit be for an account, this article would apply. 84 P.R. 1891 and 33 P.R. 1897.

(3) Suit for partition and accounts :—

A suit by a member of a joint Hindu family for partition of the ancestral property with the additions to the estate purchased out of the profits thereof, and for an account, would not be governed by this article. 14 C. 498—14 I.A. 37 (P.C.).

(4) Suit against heirs of deceased debtor on account stated :—

A suit against the heirs of a deceased debtor to recover money due on an account stated between the plaintiff and the deceased debtor, is not governed by this article but by art. 64, the cause of action being one and the same, namely, when the debt was found to be due on the account stated. 25 A. 67.

(5) Suit against testator's widow *re* trusts :—

Where a suit prayed that the charitable trusts of a testator might be carried out, and sought for accounts against the testator's widow and certain trustees and for a scheme for the management of the trust property, the suit was governed by S. 10, and not by this article, since the suit was for the purpose of following the trust property in the hands of the defendant and for applying the property to the proper purposes of the trust. 18 B. 551.

B.—Article Inapplicable—(continued).

E.—Suit relating to legacy.

Suit for legacy :—

Where the prayer for the administration of an estate is only ancillary to the plaintiff's claim for a legacy, this article will not apply, but art. 123 will be applicable. 12 M.L.J. 183=25 M. 861.

F.—Miscellaneous suits.

(1) Suit against tenants :—

A suit by a landlord for the removal of trees planted by the defendants on land held by them as occupancy tenants under the former would be governed by art. 32 and not by this article. 8 A. 446=6 A.W.N. 210.

(2) Suit for apportionment of kattubadi :—

A——, the apportionment made by the Collector being illegal and without authority, is not governed by this article. 3 M.L.J. 258=15 M. 492.

(3) Suit by mortgagee against mortgagor's creditors :—

A suit by a mortgagee to recover the mortgage-money from the defendants, the creditors of the mortgagor, who had drawn out the surplus sale-proceeds of the mortgaged property sold for arrears of Government revenue, is governed by art. 132 and not by this article; but interest, by way of damages, on the mortgage amount will be awarded only for six years prior to suit. 5 C.W.N. 356.

(4) Suit by childless proprietor's collaterals :—

Where a childless proprietor alienated his property to the knowledge of the collaterals and died, a suit by the latter (the collaterals) for possession of the property, brought more than six years after the proprietor's death, held not barred by limitation, the article applicable being 144, it not being necessary for the maintenance of such a suit that a suit for a declaration, that the alienation was not binding on the plaintiffs, should have been brought. 116 P.R. 1890 (F.B.), (*distinguishing* 10 P.R. 1890.)

(5) Suit by mortgagor for excess rents and profits :—

Where, after the mortgagor has obtained possession of the mortgaged property in execution of a decree for redemption, a suit to recover from the mortgagee the excess rents and profits collected by him, is not governed by this article, but by art. 105. 4 O.C. 355.

(6) Suit for possession of immoveable property :—

Where the will of plaintiff's father provided for the devolution of certain property in a manner unfavourable to the plaintiff, a suit by the latter for the recovery of the property on the basis of his title is governed by art. 144, his omission to sue for a cancellation of the will or for a declaration that it was null and void not barring his rights. 56 P.R. 1894; 110 P.R.=1890 (F.B.); see, also, 54 P.R. 1891. Cf. 116 P.R. 1890 (F.B.).

B.—Article inapplicable—(*continued*).F.—Miscellaneous suits—(*continued*).(7) **Suit to enforce award :—**

A suit to enforce an award made by arbitrators is governed by art. 118 and not by this article. 67 P.R. 1889.

(8) **Suit by Pujari for temple lands :—**

A suit by a *Pujari* for possession of the temple lands managed by defendant on behalf of the temple and for an account is governed by art. 144 and not by this article. 8 C.P.L.R. 49.

(9) **Suit against sons on mortgage bond given by Mitakshara father :—**

A suit upon a mortgage bond executed by the father in a Mitakshara family without the consent of his minor sons, brought against the sons, is governed by art. 132. 2 C.W.N. 603.

(10) **Suit to recover arrears under settlement-decree :—**

A suit to recover arrears of money due under a settlement decree is a suit to enforce a charge upon immoveable property, and is governed by art. 132 and not by this article. 7 O.C. 108.

(11) **Suit for right of worship :—**

A suit for a *palla* or right of worship of an idol in turn, is not governed by this article, but by art. 131. 8 C. 807.

(12) **Suit for recovery of mortgage-debt out of surplus sale-proceeds :—**

Where a mortgaged property was sold for arrears of Govt. revenue, a suit by the mortgagee for the satisfaction of the mortgage-debt out of the surplus sale-proceeds would be governed by art. 132 and not by this article. 31 C. 745.

(13) **Primary relief, mandatory injunction—Secondary relief, ejectment :—**

Where, in a suit by a landlord against his tenant, the primary relief sought was in effect a mandatory injunction, directing the defendant to fill up a tank excavated by him contrary to the provisions of the tenancy and the secondary relief was for ejectment, the suit was governed by art. 32 and not by this article. 26 C. 564 (F.B.)

(14) **Suit for haq-i-shaharum :—**

A ——— by a Zemindar is not governed by this article, whether the claim is based on custom or otherwise. 18 A. 430—16 A.W.N. 140 (*following* 1 A. 444 (F.B.) and 2 A. 358).

(15) **Suit for possession of property attached by a Magistrate :—**

A suit for possession of property attached by a Magistrate under s. 146, Cr. P. Code, is not governed by this article or art. 47, but is governed by art. 142 or 144. 20 A. 120.

(16) **Suit to enforce penal provisions :—**

A claim under S. 2 of Act XIII of 1859, to recover an advance made to a labourer, is not governed by this article, as proceedings taken under the above Act are not suits. 11 M. 392.

B.—Article Inapplicable—(*concluded*).

F.—Miscellaneous suits—(*concluded*).

(17) **Suit to sell moveables pledged:—**

Where a debtor executed an unregistered bond and as collateral security pledged certain moveables, a suit to recover the principal and interest by sale of the moveables is governed by art. 80 and not by this article, the right to sell the moveables being an accessory to the right created by the bond. 11 M. 158.

(18) **Suit for compensation for wrongful attachment:—**

A suit for compensation for wrongfully procuring an attachment of moveable property, before judgment, is not governed by this article, but by art. 49. 6 M.L.J. 12=19 M. 80.

(*Old Law.*)

(1) **Suit for divorce *a vinculo*:—**

The provisions of the statute of limitation did not apply to a suit for divorce *a vinculo*. 10 B.L.R. 301=18 W.R. 480.

(2) **Suit to recover money:—**

(a) A suit to recover money due under a written instrument executed before Act XVI of 1864 came into force, was governed by cl. 16, S. 1, Act XIV of 1859. 2 M.H.C. 329; 2 M.H.C. 401.

(b) Under Act XIV of 1859, suits upon written instruments which could not have been registered under the law, were governed by the six years' limitation under S. 1, cl. 16. 11 M. 207.

Part VIII.—Twelve years.

121.—To avoid⁽¹⁾ incumbrances⁽²⁾ *Twelve years.* When the sale becomes final and conclusive.
or under-tenures⁽³⁾ in an entire estate sold for arrears of Government revenue, or in a *patni taluq* or other saleable tenure sold for arrears of rent.

(*Old Acts.*)

[Arts. 119 & 120 of Act IX of 1871.—

Art. 119, Col. 1—By an auction-purchaser or any one claiming under him to avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, the estate being, by virtue of such sale, freed from incumbrances and under-tenures. Cols. 2 & 3.—Same as above.

Art. 120, Col. 1—To avoid incumbrances or under-tenures in a *patni taluq* or other saleable tenures sold for arrears of rent, the taluq or tenure being, by virtue of such sale, freed from incumbrances and under-tenures. Cols. 2 & 3.—Same as above.

(Old Acts.)—(concluded).

Sec. 7 and Sec. 1, cl. 12 of Act XIV of 1859.—

Sec. 7.—*In suits to avoid incumbrances or under-tenures in an estate sold for arrears of Government revenue due from such estate, or in a putnee talook or other saleable tenure sold for arrears of rent, which, by virtue of such sale, becomes freed from incumbrances and under-tenures, the cause of action shall be deemed to have arisen at the time when the sale of the estate, talook, or tenure became final and conclusive.*

Sec. 1, cl. 12.—*To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.]*

(Notes)

Scope of article.

The article is inapplicable to the case of an auction-purchaser of an estate sold for arrears of revenue not accruing upon itself. Such a person cannot avail himself of the benefit of this article. 22 C. 244, quoted in Mitra's Limitation at p. 963.

See, further, 4 C. 860 = 4 C.L.R. 6 and 9 C. 683 = 12 C.L.R. 304 (F.B.) under Heading 3, *infra*.

1.—'Avoid.'

Meaning of:—

The word 'avoid' must be construed as 'to do something in exercise of the right of avoidance.' 4 C. 860 = 4 C.L.R. 6.

Avoidance to be within reasonable time:—

Justice and sound policy require that the option of avoidance should be exercised 'within a reasonable time,' but this object is in some measure secured by the Limitation Act. 11 W.R. 10 (P.C.) quoted in Mitra's Limitation, at p. 962.

2.—'Incumbrance.'

(1) Under-tenure:—

An under-tenure is an 'incumbrance' within the meaning of S. 66, Bengal Act VIII of 1869. 9 C. 683 (F.B.) = 12 C.L.R. 304.

(2) Adverse possession:—

— is an incumbrance within the meaning of this article. 25 C. 167; 22 C. 244; Cf., 19 C. 787 and 10 W.R. 15.

A suit by auction-purchaser of a *putni*-taluk to recover possession of land within the taluk against a trespasser, time would begin to run from the date when the sale becomes final and conclusive. 25 C. 167.

(3) Suit for possession by a purchaser:—

In a suit for possession by a purchaser at a *putni* sale under Regulation VIII of 1819, he is not affected by any adverse possession prior to date of sale, and is entitled to the *putni* free from all incumbrances and in the condition in which it was created. 19 C. 787.

2.—‘Incumbrance.’—(concluded).

(4) Suit by assignee of auction-purchaser:—

- (a) A suit by the assignee of an auction-purchaser at a revenue sale, to resume *lakheraj* lands, is governed by the twelve years' period, either under this article or art. 130, which period is subject to the limitation of 60 years which would be a bar to the Government. 10 C.L.R. 41.
- (b) The transferee of a purchaser at a revenue sale acquires all the rights of the transferor, if the transfer follows immediately upon the sale or within a reasonable time thereafter. 22 W.R. 29; Cf. 15 W.R. 481; 9 C. 683 (685).
- (c) A suit by the plaintiff, who has purchased the estate from the purchaser at a revenue sale, to resume the land, must be instituted under this article and art. 130, within twelve years of the revenue sale, if his right accrued to him on the date of the revenue sale. 22 C. 244 (250, 251).

(5) Laches of old proprietor:—

- (a) The 'incumbrance' under S. 71, in Assam Land and Revenue Regulation I of 1886, includes not merely an incumbrance created by the previous holder, but also an incumbrance created by his acquiescence or laches, and a purchaser at a revenue sale is entitled to avoid the interest acquired by any one by adverse possession. 26 C. 194 = 3 C.W.N. 108.
- (b) In a suit to recover possession of land by a purchaser at a revenue sale, the purchaser is not affected by the laches of the old proprietor. 15 C. 353; Cf., 8 W.R. 62; 8 W.R. 22, 222; 11 B.L.R. 71 (P.C.); 10 W.R. 15.
- (c) The purchaser of a *putni taluq* for arrears of the landlord's rent acquires it free of all incumbrances created by the outgoing *putnidar*, and, in a suit by the purchaser to recover possession, the cause of action arose, under Act XIV of 1859, from the date of sale. 17 W.R. 407.

(6) Acts or omissions of previous Zemindar:—

An auction-purchaser of a Zemindari at a revenue sale is not affected by any difficulty arising from the law of limitation, nor is he conclusively barred by the acts or omissions of the former Zemindar, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the Zemindary. 11 B.L.R. 71 (P.C.)

(7) Suit for resumption of lakheraj grants:—

In a suit to resume *lakheraj* grants made subsequent to 1st December, 1790, held, the Government, or auction-purchaser claiming under the Government, must sue within 60 years under art. 149, and that a purchaser at a revenue sale is governed by the twelve years' period either under this article or 130, which period is subject to the limitation of 60 years, which will be a bar to Government. 8 C. 230 (235, 236). See No. 4a, *supra*.

(8) Case of relinquishment by putnidar:—

Where the *putni* comes to an end, not by reason of any sale for arrears of rent, but by voluntary relinquishment by the *putnidar* in favour of the Zemindar, a suit by the latter to recover possession of the land is not governed by this article but by art. 144, the cause of action arising from the date when the possession of the defendants became adverse to the plaintiff. 26 C. 460.

3.—‘Under-tenures.’

(1) Suit by auction-purchaser of a *putni*:—

- (a) This article is applicable to recover possession of the subject of under-tenure by an auction-purchaser of a *putni* at a revenue sale, the cause of action arising from the time of auction-sale, inasmuch as all under-tenures created by the former holder of the tenure are *ipso facto* avoided by the sale, and not merely voidable at the option of the purchaser. 4 C. 860—4 C.L.R. 6.

But see 9 C. 683—12 C.L.R. 304, where it is held that the sale of a *putni* tenure for its own arrears under Ss. 59 and 60, Bengal Act VIII of 1869, does not *per se* avoid the *darputni* tenures, but only renders them voidable at the option of the purchaser.

(2) Sale of under-tenure under Act X of 1859:—

Where an under-tenure was sold for arrears of rent under S. 105, Act X of 1859, held, in a suit to recover possession of the land, the cause of action accrued from the time of the purchase of the tenure of the defaulter. 10 W.R. 15.

General.

(1) Burden of proof:—

A person, seeking to avoid an incumbrance, must adduce at least some *prima facie* evidence showing that the incumbrance was imposed on the tenure by some person who previously held it. 8 C. 230.

(2) Auction-purchaser's title:—

An auction-purchaser at a revenue sale does not derive his title from the defaulting proprietor. 12 C. 82; see also 8 W.R. 222.

(3) Necessity for notice:—

A person seeking to avoid an incumbrance or under-tenure need not issue a notice or do any other act before bringing his suit. 12 C.L.R. 304; 9 C. 683 (F.B.).—See also *Mitra's Limitation*, at p. 962.

122.—Upon a judgment obtained *Twelve years*. The date of the judgment in British India,⁽¹⁾ or a re-ment or recognizance. cognizance.

(Old Acts.)

[Art. 121 of Act IX of 1871.—Same as above.]

Sec. 1, cl. 11 of Act XIV of 1859.—To suits in cases governed by English law upon all debts and obligations of record and specialties—the period of twelve years from the time the cause of action arose.]

(Notes)

1.—‘Judgment obtained in British India.’

(1) Right of suit:—

- (a) A suit will not lie upon a decree, the execution of which is barred by the provisions of the Limitation Act. 6 B. 7.
- (b) The exception to the rule, that a suit will not lie in the Courts of India upon the judgment of any Court in British India, is in the case of

1.—‘Judgment obtained in British India.’—(continued).

a judgment of a Small Cause Court, on which suits are permitted to be brought in the High Court in order to obtain execution against immoveable property. 6 B. 292.

- (c) Before the Presidency Small Cause Courts Act, XV of 1882, a judgment-creditor in the Court of Small Causes had no right to sue in that Court on his judgment. 8 B. 1.
- (d) There is nothing to prevent a suit being brought in the High Court upon a decree of that Court. 7 C. 74.
- (e) But a suit will not lie in the High Court upon a decree of the Small Cause Court. 5 C. 294 = 4 C.L.R. 477.

(2) Suit against Hindu sons on judgment against father :—

- (a) Where the execution of a money-decree obtained against the father was refused as against the family properties in the possession of the sons, a suit by the decree-holder against the sons and their uncles to enforce the debt created by the judgment is not a ‘suit upon a judgment,’ the judgment being against the father only, and is governed by art. 120 and not by this article. 14 M.L.J. 84 (F.B.) = 27 M. 243.
- (b) Where a personal decree on a mortgage was passed against a Hindu and his sons and the attachment of the family properties in execution of the decree was successfully resisted by the sons of the mortgagor born subsequent to the date of the decree, a suit by the decree-holder, against the sons of the mortgagor and their nephews for payment of the balance of the decree-amount out of the family properties, is not governed by this article but by art. 120. 17 M. 122.
- (c) Where the decree for money obtained against the father was kept alive and the father died after the original debt became barred, a suit by the decree-holder against the sons to enforce the debt created by the decree is governed by art. 120 and not by this article, there being only one cause of action in the case. 23 M. 292. (F.B.).

(3) Suit on award :—

A suit upon an award obtained in British India would be governed by this article, if the award could be considered a judgment. (1892—96, L.B. R. 481 (486)).

(4) Suit on mortgage-decree :—

Where an application was made to the High Court for an order absolute of the mortgage properties, in execution of a mortgage-decree transferred to it for execution by a Mofussil Court, and the application was refused on the ground that the mortgaged properties were outside the territorial jurisdiction of the High Court, a suit by the decree-holder for the administration of the estate of the mortgagor and for sale of the mortgaged properties, brought more than twelve years after either the original debt or the mortgage-decree, was held barred by limitation. 24 C. 473.

1.—'Judgment obtained in British India.'—(concluded).

(5) Instalment-decree :—

A suit on a judgment by the representative of a decree-holder against the representative of a judgment-debtor, a *sirdar*, held governed by this article. But the decree being an instalment-decree passed before Act IX of 1871, it was held that the cause of action arose from each instalment, each such instalment becoming a separate judgment. 3 B. 193.

- 123.**—For a legacy⁽¹⁾ or for a *Twelve years*. When the legacy or share of a residuo⁽²⁾ bequeathed by a testator, share becomes payable or deliverable, or for a distributive share⁽³⁾ of the property of an intestate.

(Old Acts.)

[Art. 123 of Act IX of 1871.—Col. 1: For a legacy or for a distributive share of the moveable property of a testator or intestate. Cols. 2 & 3:—same as above.

S. 1, cl. 11 of Act XIV of 1859.—To suits for the recovery of any legacy—the period of twelve years from the time the cause of action arose.]

(Notes)

Scope of article.

(1) Applicability of article :—

This article is applicable only to cases in which the defendant lawfully represents the estate of the deceased. 12 M. 487.

(2) Suit by co-sharer for share in *vatan* :—

A suit by a co-sharer to recover his share in a *vatan*, received by the defendants from Government, is not governed by this article, but by art. 131; and the suit, if brought within twelve years from the date of payment to a co-sharer by the Government, will be in time, though more than 12 years from the grant of certificate of administration. 14 B. 236.

(3) Suit by Mahomedan widow—Custom :—

A suit by a Mahomedan widow, against the brother of her deceased husband, for a declaration of her right to possess for life the estate of the latter in accordance with a local custom, is not governed by this article, but by art. 120. 21 C. 157.

(4) Suit for setting aside will :—

Where a will makes a certain illegal disposition of property, a suit by the heir of the testator for setting aside the will, and for recovery, as undisposed of residue, of the property so disposed of, must be brought within 12 years from the date of testator's death. 8 C. 788 (800 to 802)—11 C.L.R. 370.

Scope of article—(concluded).

(5) Suit for property and for accounts :—

A suit brought by the plaintiffs, claiming to be heirs of their father, and praying for recovery as against their father's wife, their step-mother, of properties, which they alleged to have formed part of their father's estate, and for accounts, was *held* not governed by this article, but by art. 120 or 144, so far as it related to immoveables, and by art. 89 or 90 so far as it dealt with moveables. 5 C. 692 = 5 C.L.R. 505.

(6) Suit by heir-at-law against executor—Void bequest :—

A suit by the heir-at-law against an executor, to recover properties in respect of which there was a void bequest or devise by the testator, would be governed by art. 144 or this article, and must be brought within 12 years from the testator's death, the executor's possession in such a case being adverse to the heir-at-law from the very commencement. 2 C.L.R. 112.

(7) Claim by widow against co-widow :—

A suit by a widow to recover property, given her by her husband by means of a deed of gift and in respect of which succession certificate had been granted to her co-widow, brought more than 8 years after her husband's death, was not barred, such property not having been realized by the co-widow. 16 P.R. 1897.

(8) Devolution on several persons jointly :—

Where the plaintiff sued for his share of the estate of his ancestor, on the allegation that he had obtained possession on the death of the ancestor and had subsequently entrusted it to defendant, who refused to restore it on demand, and it was found that plaintiff never had possession and there was no trust, the suit was governed by art. 144. 97 P.R. 1890.

(9) Case of adverse possession :—

A suit for a share in certain property, due to the plaintiff under a will of the owner thereof, on the allegation that the defendants had all along admitted the plaintiff's right to the share and professed readiness to give it whenever demanded and denied the plaintiff's right only a very few years before suit, was not governed by this article, but by art. 144. 86 P.L.R. 1902.

Right of suit.

Suit for administration :—

Though the heir of a testator may be barred by limitation from recovering undisposed of property, still, he might bring a suit against the trustees appointed under the will to compel them to properly administer the trusts which had not failed. 8 C. 788 = 11 C.L.R. 370.

I.—'For a legacy.'

(1) Shares due under will :—

A suit to recover shares, to which the plaintiffs became entitled under a will of their grand-father, was governed by this article. 28 B. 80.

1.—'For a legacy'—(concluded).

(2) Property must be sought to be recovered as legacy:—

This article applies only to cases in which the property sought to be recovered is not only legacy but is also sought to be recovered as such from a person who is bound by law to pay such legacy, as being the executor of the will or representative of the testator. 9 C. 79.

(3) Suit for legacy and for accounts:—

Where a legacy was payable at the expiration of one year from the testator's death, a suit for the recovery of the same from the executor personally, (misconduct being alleged) and for an account, was *held* governed by this article. 19 M. 425.

(4) Administration—Ancillary claim:—

Where the suit is one for a legacy in satisfaction of indebtedness, the mere fact that there is a prayer for an administration of the estate as an ancillary claim, will not take the case out of this article. 25 M. 361 = 12 M.L.J. 183.

(5) Suit for determination of legacy:—

Where a suit is not for the recovery of a legacy, but only for determination of what that legacy is, art. 123 would not apply. 8 C. 788 (802) = 11 C. L.R. 370.

(6) Creditor's claim to recover debt:—

Where a testator directed that the devisee should repay to his father the debt owed by the testator, a suit by the auction-purchaser of the creditor's claim to recover the debt was governed by art. 132. 15 C. 66 (P.C.) = 14 I.A. 137.

(Old Law).

Suit for a legacy:—

Where a testator gave a certain amount to one of his daughters and directed the amount to be kept as *amanut* in the family treasury, till the birth of a male child to her, a suit by her sons to recover what was thus left to her, was governed by cl. 11, S. 1, Act XIV of 1859, the cause of action arising at the date of the birth of the elder of the sons. 13 W. R. 354.

2.—'For a share of a residue.'

Art. 122 of Act IX of 1871 was *held* to apply to a suit for a share of the residue of a testator's moveable property disposed of by his will. 2 C. 45.

3.—'For a distributive share, &c.'

(1) Suit for distributive share of a Mahomedan's estate:—

A suit by a Mahomedan against other members of her family for her share in the estate of her mother is governed by art. 144 and not by this article. 16 M. 61 (F B) = 2 M.L.J. 200.

(NOTE).—This case probably *overrules* the next two cases.

3.—‘ For a distributive share, &c ’—(continued).

(2) Suit by Mahomedan to recover share in ancestor's estate :—

A suit by a Mahomedan to recover his share in the property of his maternal grandfather, which had been enjoyed jointly by his descendants, is not governed by art. 127, but by this article. 15 M. 57.

(3) Suit by Mapla widow :—

A suit by the widow of a *Mapla*, who had died intestate more than 14 years before the suit, to recover her share in her husband's property, is governed by this article, and as such, it is barred. 15 M. 60=1 M.L.J. 754.

(4) Postponement of period of distribution :—

The period of distribution of a legacy is not *postponed* by reason of the personal incapacity of some of the beneficiaries. 23 C. 563.

(5) Claim by co-heir—Property redeemed from mortgage :—

A suit by a co-heir, claiming a share in joint family property, is governed by the 12 years' limitation, whether this article or art. 144 applies. 2 U. B.R. (1892-96), 500.

(6) Claim by co-heir :—

Plaintiffs sued defendants for a share in an undivided estate, alleging that the share of land claimed had been owned by a remote common ancestor. Such a suit is barred by limitation, unless plaintiffs can show that they had some possession or enjoyment in the share within 12 years prior to suit, whether this article or art. 142 or 144 applies. 2 U.B.R. (1892-96), 493.

(7) Claim by co-heir—Property redeemed from mortgage :—

A suit by plaintiff for recovery of his share in property redeemed by defendant, a co-heir, is governed by the 12 years' rule, whether this article or art. 142 or 144 applies. 2 U.B.R. (1892-96), 487.

(8) Suit by heir of mortgagor against redeemer :—

A suit by an heir of a mortgagor, against a person who has redeemed the property in suit from a mortgage, otherwise than as the heir of the mortgagor, and who claimed the property in his own right, for redemption of his share on payment of a proportionate amount, is governed by the 12 years' rule. 2 U.B.R. (1897-1901), 454.

(9) Suit for share by Buddhist eldest daughter :—

Plaintiff, the eldest daughter, sued her mother and her brothers for one-fourth share of a grant of land, the ancestral property of her father, who died 29 years prior to suit. *Held*, the suit was governed by this article and barred. L.B.R. (1898-1900), 625.

(10) Suit by Buddhist grand-daughter :—

A ——— for recovery of her share in her maternal grandfather's estate (he having died intestate about 18 years prior to suit), *held* barred by this article. L.B.R. (1898-1900), 580.

3.—‘For a distributive share, &c.—(concluded).

(11) Suit by Buddhist daughters:—

A———for a share in their deceased mother's estate, is governed by the 12 years' rule contained in this article, the cause of action arising at the death of the deceased. I.B.R. (1893-1900), 415.

(12) Suit by Buddhist eldest son:—

This article applies to a suit by an eldest son (*a Buddhist*) for one-fourth share of the estate of his father and no other, the cause of action arising at the death of the mother. 2 L.B.R. 110.

General.

The share of a next of kin in the estate of an intestate, while in the hands of the administrator, is liable for a debt due by the next of kin to the deceased, though barred at the date of the death of the latter. 2 B. 75.

(1) Suit by Burmese Buddhist co-heir:—

A———against other co-heirs for recovery of a share of property alleged to have been inherited from the parents of the parties more than 13 years before suit, the plaintiff not having received any benefit at all and the defendants having been in possession throughout, was *held* governed by art. 144. 2 I.B.R. (1903), 184.

(2) Suit for moveables by inheritance:—

A suit for recovery of ornaments or their value, by right of inheritance, is not a suit for the whole or a share of the property of an intestate, within the meaning of art. 28 of the Provincial Small Cause Courts Act of 1887. 2 A.L.J. 388=A.W.N. (1905), 134.

(3) Suit by Mahomedans:—

A suit by a Mahomedan for a share of the property of an intestate, against the other sharers, was *held* to fall within this article. 1 M.L.J. 754 (Note) and 1 M.L.J. 757 (Note)

(4) Suit by Malabar Tarwad:—

A suit by six-divided branches of a Malabar *tarwad* against a seventh divided branch for their shares of the property which had belonged to a neighth-branch, which became extinct, *held* governed by this article and not by art. 127. 4 M.L.J. 43.

124.—For possession of an *Twelve years*. When the defendant takes possession of the hereditary office.⁽¹⁾ office adversely⁽²⁾ to the plaintiff.

Explanation.—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.

(Old Acts.)

[Act IX of 1871, art 123.—C.D.s. 1 & 2: same as above.—Col. 3: when the defendant, or some person through whom he claims took possession of the office adversely to the plaintiff.

Act XIV of 1859:—No corresponding provision.]

(Notes)

Scope of article.

(1) Suit not for hereditary office :—

(a) A suit, not for a hereditary office, but one by existing *Karnams* to declare the appointment of another *Karnam* jointly with themselves as void, does not fall within the provision of this article. 17 M 395=3 M.L.J. 237.

(b) In a suit to recover the properties of a religious endowment alienated by the plaintiff's predecessor, the fact that his predecessor neglected to perform the charities and the purchaser from him performed it regularly, will not make the alienation one of a hereditary office so as to bring the suit within the scope of this article. 9 M.L.J. 93.

(2) Suit based on relation of *uralan* and *pattamali* :—

A suit based on the relation of *uralan* and *pattamali* between plaintiff and defendant is governed by art. 120 or 144, and not by this article. 3 M.L.J. 213.

(3) Suit by *pujari* for lands and accounts :—

A suit by a *pujari* to recover possession of lands belonging to a temple and for an account was held governed by art. 144. 8 C.P.L.R. 49.

(4) Claim to office other than hereditary office :—

Where a suit is brought for an office and lands attached thereto, not as a hereditary office but on the ground of adverse possession and dispossession, it would be governed not by this article but by art. 120. A prescriptive title to an office, claimed otherwise than as a hereditary office, is acquired by more than six years' adverse possession. The claim to the land, in such a case, held dependent on the claim to the office. 26 M. 113.

I.—'Hereditary offices'

(1) Suit for possession of hereditary offices :—

The period of limitation for possession of an hereditary office is 12 years from the time when defendant takes possession of the office adversely to plaintiff or any person through whom he derives his right to sue. 2 Bom. L.R. 597 (599).

(2) Suit for office of *shebait* :—

A suit for possession of the office of *shebait* is governed by 12 years' limitation under this article, and not by the 6 years' rule under art. 120. 25 C. 354.

1.—'Hereditary office.'—(continued).

(3) Suit for appointment to office of shebait:—

This article would apply to a suit for the appointment to the office of *shebait*, if the appointment be by succession through inheritance; but if the appointment be by nomination, art. 120 would apply. 19 C. 776.

(4) Suit by shebait for khas possession of mokurari property:—

A suit by a *shebait* to recover *khas* possession of *mokurari* property belonging to the idol, and for a declaration that certain documents executed by his predecessor in office were invalid, would be governed by art. 184 or 144, and not by this article. 23 C. 536.

(5) Shebait entitled only to life-estate in office:—

The word 'successively' in the provision regulating the management of endow-
ed property gives only a life-estate in the office of *shebait* to the person
named, and, after the lifetime of the last of such persons, the manage-
ment reverts to the donor's heirs. 29 C. 716.

(6) Right to be shebait:—

The heir or heirs of the founder of an endowment is entitled to be *shebait*
thereof, but subject to any condition imposed by the donor himself.
17 C. 3.

(7) Suit to establish title and suit for arrears:—

The cause of action to establish title, and the cause of action to recover arrears,
which rest on such title, are not distinct and independent of each
other; if the former be barred, the latter also will be barred. 9 Bom.
H.C.A.C. 260.

(8) Constitution of wakf:—

The use of the word '*wakf*' is not necessary to constitute a *wakf*; it is suffi-
cient if the intention of the donor is to set apart specific property for
some specific object recognised by Mahomedan Law as a pious object.
19 C. 203.

(9) Suit re office of Khadims:—

A suit for a declaration that the plaintiffs are the *khadims* of a certain *dwrga*,
and, as such, entitled to perform the duties attached to that office for a
certain number of days in each month and during that period to
receive the offerings made by the worshippers at the *dwrga*, is governed
by this article, since the claim is to an hereditary office. 24 C. 83.

(10) Suit to recover fees due to a village Joshi:—

A suit to recover fees payable to the incumbent of an hereditary office, such as
that of a village *joshi*, was governed by Act XIV of 1859, S. 1, cl. 12.
9 Bom. H.C. 99.

(11) Suit for declaration:—

A suit for a declaration that the plaintiff, by right of inheritance, is the
chief manager of certain temple services and properties, and as such, is
entitled to dismiss the defendant and appoint another as sub-manager,

1.—'Hereditary office.'—(continued).

is governed by this article, the limitation commencing from the time when the defendant obtained *adverse* possession of the office and property. 6 A. 1.

(12) Suit for declaration of plaintiff's right to management :—

This article applies to a suit for the establishment of the plaintiff's right to the management of a trust property; but if the suit be for establishing the right of the endowment, art. 134 would apply. 27 B. 368.

(13) Deshmukhi allowance :—

A suit to establish the plaintiff's title to a share in the *deshmukhi* allowance annually received by the defendant from Government is governed by art. 131 and to recover the arrears due, by art. 62. 15 B. 135.

(14) Suit by vatandar deshmukh's son :—

Where a *vatandar deshmukh* appointed the defendants and their heirs hereditary *vutani gumastas*, and granted, by way of remuneration, certain money and grain of the *vatan* income, a suit, by his sons for a declaration that the grant was invalid as against them, brought within 12 years from the date of their father's death, was held to be in time. 12 B. 80.

(15) Suit by successor of lingayat priest :—

Where the *jangam* or presiding *lingayat*-priest of a *Math* mortgaged the *math* property, a suit by the successor in office to recover possession of the property, brought within 12 years from the date of the death of the mortgagor-*jangam*, was not barred. 10 B. 34.

(16) Share of income of vatan :—

A suit to recover a share of the income of a certain *vatan* was governed by 12 years' limitation, whether Act XIV of 1859 or Act IX of 1871 was applicable to the case. If the plaintiff's title had been already established by a decree, there is nothing in the law of limitation to prevent him from recovering arrears for 12 years prior to suit. 5 B. 68.

(17) Right of suit :—

A suit for a declaration that the plaintiff was entitled to an one-fourth share in certain *patliki vatan*, is a suit cognizable by Civil Court. 1 B. 535.

(18) Holders of hereditary offices—Res Judicata—Limitation :—

In the case of successive holders of hereditary offices, in the absence of fraud or collusion, a predecessor fully represents his successors for purposes of *res judicata* and limitation. 10 M.L.J. 114.

(19) Management of temple by rotation :—

Where the management of a public religious institution devolved by rotation in the senior branch of the hereditary trustees for more than twelve years, to the exclusion of the members of the junior branch, the right of the members of the junior branch became extinguished, whether this article or art. 127 or 142 is applicable to the case; it is immaterial that no member of the senior branch was in continuous possession for twelve years. 13 M.L.J. 341—27 M. 192.

1. — 'Hereditary office.'—(continued).

(20) Offices of Mohunts and their duties:—

As for the law regarding offices of *Mohunts* and their functions and duties, and the law as to religious endowment, see 1 M. 235 (P.G.)—4 I.A. 76.

(21) Suit by heir of founder of temple:—

A suit by the eldest surviving male member of the family of the founder of a temple, claiming the office of *dharma-karta*, is governed by this article. 1 M. 343.

(22) Suit by dharma-karta disavowing predecessor's acts:—

A——— is governed by the twelve years' rule, the cause of action arising from the plaintiff's accession to office. 13 M. 277.

(23) Claim for exclusive management:—

A suit for a declaration that the family of the plaintiffs are entitled to the exclusive management of the affairs of a *devasom*, is governed by the 12 years' rule. 14 M. 153.

(24) Acquisition of title by compromise:—

A title to joint management of a temple can be acquired by compromise of a pending litigation between two families; and once a compromise is entered into, it will be binding on the parties compromising the litigation and their successors. 18 M. 1.—22 I.A. 128 (P.G.)

(25) Acquisition of title by prescription:—

(a) Where a suit by the defendant against the plaintiff, to recover a moiety of a village attached to a certain office in a temple, was dismissed on the ground that the office and emoluments were indivisible, a subsequent suit by the plaintiff to establish his right to the entire office and to recover possession of another village attached to the office can be resisted by the defendant on the ground that he has acquired, by *adverse* possession, a divisible right to a moiety in the village, though this might not have been the basis of his claim in the previous suit. 21 M. 278.

(b) A trusteeship, with power to appoint successors, can be acquired by prescription. 24 M. 219.

(26) Suit for emoluments:—

A suit, not to establish plaintiff's right to receive the customary dues of an hereditary office, but to recover a specific sum of money alleged to have become due and payable to him as an emolument of the office by custom or as a fee due to him as the holder of an hereditary office, is not governed by this article, but by art. 120. 22 M. 351.

(27) Claim to office and lands of endowment:—

A suit to recover the hereditary managership of a temple and possession of the lands of the endowments, is governed by this article. There is no distinction, as regards limitation, between a claim to an office and a claim for the property of the endowment. 23 M. 271—27 I.A. 69 (P.G.)—10 M.L.J. 39.

1.—'Hereditary office.'—(concluded).

(28) Recovery of land attached to office of trustee :—

Where the trustee of a temple, who was in office for more than twelve years, did not sue to recover lands which provided the emoluments of the office of *meikaval* in the temple, a suit by his successor to recover them was barred. 28 M. 439=9 M.L.J. 8.

(29) Appointment of successors :—

Where a person acquires a valid title to the trusteeship of a public charity with power to appoint a successor, he can appoint a successor, giving him a similar power to appoint his own successor. 24 M. 219.

(30) Lands attached to office of karnam :—

No alienation is permissible of land attached to the office of *karnam*, in permanently-settled estates, to the prejudice of the alienor's successor. 7 M. 85.

2.—'When the defendant.....adversely to the plaintiffs.'

(1) Adverse possession against vatandar's heir :—

A sale by a hereditary *vatandar* of *vatan* property is void, whether the sale took place before or after the repeal of Regulation XVI of 1827, and adverse possession begins to run against the heir from the death of the *vatandar*. 5 B. 437.

(2) Adverse possession during vatan holder's life :—

Adverse possession of service-*vatan* for 12 years during the lifetime of one holder is a bar to succeeding holders, provided there is no fraud or collusion. 9 B. 198 (F.B.).

(3) Alienation of endowed property :—

Where endowed property is sold by a *Mohunt*, ordinarily no length of possession during the vendor's life-time would give the purchaser a valid title as against his successor. 20 W.R. 471.

(4) Alienation of wakf property :—

Under Mahomedan Law, *wakf* property is not alienable; if alienated, the *mut-wallee* would be allowed to recover possession thereof within 12 years from the date of his appointment. 6 W.R. 8; 2 M.L.A. 890 (P.C.).

But, since the passing of Act XX of 1863, the limitation for such suits would not run from the date of the *mutwalli's* appointment, but would run from the date of the defendant's possession of the property. 17 W.R. 430.

(Old Law).

(1) Suit to recover office and lands :—

A suit to recover the office of *karnam* and land attached thereto, brought more than six years after the dismissal of the plaintiff, was barred by cl. 16, S. 1, Act XIV of 1859. 2 M. 288; 6 M.H.C. 301.

125.—Suit during the life of a *Twelve years*. The date of the alienation.
 Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land⁽¹⁾, to have an alienation of such land made by the female⁽²⁾ declared to be void except for her life or until her re-marriage.

(Old Acts.)

[Art. 124, Act IX of 1871—Suit during the life of a Hindu widow by a Hindu entitled to the possession of land on her death, to have an alienation made by the widow declared to be void except for her life—Twelve years—The date of the alienation.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

- (1) This article is inapplicable to a suit for a declaratory decree by a reversioner, where it is not alleged that there was an alienation by a widow or other life-tenant. 26 M. 488.
- (2) A suit by a reversioner, not entitled to possession immediately after the alienating widow's death, to avoid an alienation made by her, is governed by art. 120 and not by this article. 10 M.L.J. 229; 14 M.L.J. 209.
- (3) **Suit barred by a Special Act—Act IX of 1859, S. 20:—**

Where lands alienated by a Hindu widow were confiscated by Government on the conviction of the alienor for rebellion, a suit by the reversioners to recover them from the grantees under the Government, brought within twelve years from the date of the widow's death, was barred by the operation of——, since the suit was not brought before the lapse of one year from the date of seizure by Government. 13 A. 108; 1 I.A. 167 (P.C.); 13 B.L.R. 392.

1.—'Who, if the female died.....land.'

✓ (1) Suits by remote reversioners:—

- (a) The right to sue under the article belongs only to the nearest reversioner; but a more remote reversioner may sue, if the nearer reversioner or reversioners is, or are, found to have colluded with the widow, or concurred in the alienation made by her, or refused to sue or precluded himself or themselves from suing. 8 I.A. 14 = 5 C. 764 = 8 C.L.R. 381 (P.C.); 6 A. 428; 9 A. 441; 18 M. 53; 19 B. 614; 20 B. 202; 10 B. H.C.A.C. 351; 14 M.L.J. 209; 9 C.W.N. 25.

These rules apply also to cases of unauthorized adoptions by Hindu widows.

1.—‘Who, if the female died,.....land.’—(concluded).

- (b) But, if there are interpositions of only life-estates between the alienating widow and the reversioner suing, the latter may, notwithstanding the fact that he is not entitled to possession immediately on the death of the widow, maintain a suit under this article, if the holders of such life-estates take no steps to challenge the alienation by the widow. 6 A. 431; 13 M. 195; 15 M. 422; 9 C.W.N. 25.

(2) Suit by immediate reversioners:—

- (a) In cases where possession adverse to the widow, who is entitled to a life-estate, is taken by a stranger, a reversioner would be entitled to sue. If he omits to sue, adverse possession for over the statutory period will bar not only the widow but also the reversioner. 22 C. 445 (P.C.) = 22 I.A. 25; 20 A. 42; 26 C. 285; 5 A. 532; and compare 20 M. 493; 19 A. 357; 23 A. 448; 23 B. 725 = 26 I.A. 71 (P.C.); 14 B. 512; B.L.R. Sup. Vol. 1008; 15 B.L.R. 10; 13 M. 512.
- (b) This rule does not hold good, where the possession originates in an invalid alienation by the widow. 19 A. 357; 13 M. 512 (515); 5 M.H.C. 428; 15 P.R. 1879. Cf. 24 W.R. 271.
- (c) The cause of action for a suit either by the widow or the reversionary heir, in cases of adverse possession against the widow, accrues on the date of the adverse possession. 9 W.R. 505 (F.B.). And it will not revive on the death of the widow. 14 B. 512 (516).
- (d) Where property is enjoyed by a third person for more than twelve years adversely to a widow, such possession will bar the rights of a subsequently adopted son. 13 B. 276.
- (e) But see 19 B. 809, where it was held that an adopted son could recover property alienated by his adoptive mother more than twenty years before the date of adoption.

2.—‘Alienation.....made by the female.’

(1) Relinquishment by widow of life-estate:—

- (a) Where a Hindu widow relinquishes her life-interest in a portion of property inherited from her husband in favour of a reversioner, and the latter, in consideration thereof, gives an absolute interest to the widow in another portion of the estate, the next reversioner may maintain a suit for a declaration that the deeds under which the above alienations were made are invalid. 22 C. 354.
- (b) Where, during the lifetime of a Hindu widow, a suit is brought by the presumptive heir to have an alienation by her declared to operate only for her life, the grounds for the discretionary refusal of a decree should be strong. 10 C. 324 (P.C.) = 10 I.A. 150; 13 C. L. R. 118.
- (c) Where the plaintiff's mother, who was the next reversioner of a Hindu widow, allowed more than twelve years to elapse without questioning an alienation made by the widow, a suit by the plaintiff would be barred, if brought during the widow's life-time, but would not be barred if instituted after her death. 15 W.R. 1.

2.—‘Alienation.....made by the female.’—(continued).

(d) Where a Hindu widow gives over possession of her husband's property to a stranger and actually allows him to enter his name in the landlord's *sherista* as owner, such acts entitle the reversionary heirs to bring a suit, because the acts amount to setting up a title adverse to the reversioner. 10 C. 1008.

(2) Collusive judgment :—

A———allowed by a Hindu widow to be barred against her in relation to the property of her husband, is an ‘alienation’ within the meaning of this article. 19 A. 524 = 17 A.W.N. 141; *see also* 8 A. 865 (966).

(3) Hypothecation :—

Hypothecation of immoveable property is an “alienation” within the meaning of this article. 10 A.W.N. 184.

(4) Sale of mortgaged property :—

A Hindu widow, having a widow's estate in certain immoveable property, mortgaged that property by a simple mortgage. The mortgagee sued on it twelve years after the date of the mortgage and caused the property to be sold. *Held*, that a suit by the widow's daughters for a declaration that the sale affected only the life-interest of the widow, is barred by limitation. 14 A.W.N. 184.

(5) Suit for recovery of property alienated :—

(a) A suit by a reversioner to recover property alienated by the widow would be in time, if brought within 12 years from the date of the widow's death. 11 W.R. 183; 10 W.R. 276.

(b) A suit by a reversioner to recover possession of immoveable property, after cancellation of a lease executed by the widow, is governed by art. 91, and not by this article or art. 141, such a lease not being void but only voidable. 7 C.W.N. 864 = 30 C. 990.

(6) Suit by daughter's son—Confirmation of alienation by daughter :—

Where a suit brought by the daughter of the owner to set aside an alienation of the latter's property made by his widow, was withdrawn, without obtaining leave to sue again, on the ground that the alienation was valid, such confirmation of the alienation on the part of the daughter, gave a fresh cause of action for her sons to sue. 25 M. 731.

(7) Suit by adopted son for recovery of property :—

A suit by an adopted son, to recover possession of property alienated by his adoptive mother before adoption, brought during her widowhood, would be governed by art. 144, the limitation running from the date of adoption : but such a suit is not maintainable until the termination of her widowhood. 26 M. 143.

(8) Possession by alleged adopted son of widow :—

The possession by an alleged adopted son of a Hindu widow is not adverse as against the widow and the cause of action accrues to the reversioners only on the death of the widow. 4 B.L.R. 3 (F.B.)

2.—'Alienation made by the female.'—(concluded).

(9) Gift by widow to daughter :—

A ——— of the former's husband's property affords no cause of action to a reversioner, because the effect of the gift is only to accelerate the succession. 11 A. 253.

(10) Suit re declaration of invalidity of adoption :—

A suit by a reversionary heir for a declaration that defendant was not adopted by the widow, as he alleged himself to be, of his paternal uncle and that he had no right to the latter's property and that plaintiff was the reversionary heir, *held* governed by art. 118 and not by this article. 6 A.W.N. 244.

(11) Suit by an unsuccessful claimant re attachment :—

Where a reversioner's objection to the attachment of property mortgaged by a widow was disallowed, a suit by him for a declaration that the mortgage was invalid as against his reversionary interest was governed by art. 11 and not by this article. 122 P.L.R. 1904.

(12) Alienation by widow, not as widow, but as guardian of infant son :—

An alienation made by a widowed mother as the guardian of her infant son is not an alienation by her as a widow. A suit, therefore, brought by a reversioner more than twelve years from the date of the alienation, but within twelve years from the date of the widow's death, the son having predeceased the widowed mother and the latter having succeeded to his estate, *held* barred under this article. 4 M.L.J. 271=18 M. 193.

(13) Suit by reversioner to set aside sale by widow :—

In a suit by a reversioner to set aside a conveyance executed by a Hindu widow, limitation will be computed from the date of the widow's death. 10 M.L.A. 511 (535) (P.C.)

(14) No revival of right to sue once barred :—

Where a Hindu widow sold her husband's property and the reversioner did not take steps to have the sale declared void within the period prescribed by this article, a subsequent reiteration of the denial of his right gave the reversioner no fresh right to sue for a declaration in respect of the property alienated. 26 P.R. 1896.

(14-a) Nature of possession under widow :—

Possession taken through a Hindu widow, under an unauthorized alienation, cannot give the holder thereof any title superior to that of the widow. 18 W.R. 1 (P.C.)

(15) Suit by Mahomedan reversioner :—

A suit by the daughter of a Mahomedan owner, for a declaration, after cancellation of an adoption, that an alienation made by the widow of the owner was null and void against the daughter's rights after the widow's death, was governed by art. 118 and not by this article. 45 P. R. 1892.

2.—'Alienation made by the female.'—(concluded).**(16) Adverse possession :—**

If an alienation be legally inoperative and could be treated, on that ground, as non-existent, the possession of the alienee is that of a trespasser from the moment he acquires it, and will ripen into a prescriptive title after twelve years. 9 M. 244 (246). See also 9 B. 198 & 27 B. at p. 595, cited in Mitra's Limitation at p. 977.

(17) Widow can't acquire absolute title by prescription :—

A Hindu widow cannot, by merely asserting an absolute proprietary title in course of time, acquire such title by prescription, against the reversionary heir, in respect of her husband's property of which she is in possession. 88 P.R. 1881 Cf. 18 W.R. 1 (P.C.).

Cases of Punjab Reversioners.**(1) Punjab Limitation Act, (I of 1900) :—**

A suit by reversioners to have an alienation, made by a sonless proprietor, of his ancestral land, declared to be null and void as against their reversionary interest, is governed by art. 120. A suit, once barred by this article, could not be revived by the Punjab Limitation Act, I of 1900. 58 P.L.R. 1901 = 39 P.R. 1901.

(2) Gift by childless proprietor :—

Where a childless proprietor made a gift of his ancestral agricultural land, a suit by the reversioner to recover possession of the land alienated, brought within 12 years after the death of the donor, was not barred; there was no necessity for the reversioner to sue for a declaration of the invalidity of the alienation during the proprietor's lifetime. Such suit, when brought, is governed by art. 120 and not by this article. 56 P.R. 1903 (F.B.) = 93 P.L.R. 1903.

General.**(1) Limitation against one no bar against another :—**

Limitation against a prior reversioner does not operate as a bar against a subsequent reversioner, because the latter does not derive his right or title to sue from the former, even though such prior reversioner happens to be the father of the latter, but from the last full owner, there being no privity of estate between one reversioner and another. 22 A. 33; 9 C.W.N. 25; 14 M.L.J. 209.

(3) Res judicata among reversioners :—

Where there are several reversioners successively entitled to succeed on the death of a Hindu widow, a decree in a suit by one of them will not operate as *res judicata* as against others. 22 A. 382.

126.—By a Hindu governed by *Twelve years*. When the alienee takes possession⁽¹⁾ of the property, the law of the Mitakshara to set aside his father's alienation of ancestral property.

(Old Acts.)

[Art. 125 of Act IX of 1871.—Cols. 1 & 2, same as above.—Col. 3.—The date of the alienation.

Act X/V of 1859.—No corresponding provision.]

(Notes)

(Scope of article.)

- (1) The limitation prescribed by this article applies whether the alienee did or did not know that the property which he was obtaining formed part of an undivided estate. 23 B. 137 (142).
- (2) Where ancestral property was alienated by a father, a suit by his son to recover possession of the property alienated, brought within 12 years from the date on which the alienee obtained possession thereof, was not barred. 8 C.L.R. 428.
- (3) Where a Hindu father sells joint family property without the assent of his son, unless the sale was to discharge an antecedent debt or on account of a justifiable necessity, the son can bring a suit to set aside the sale within twelve years before the purchaser's possession becomes adverse under art. 144. 3 Bom. L.R. 682.

I.—'When the alienee takes possession.'

(1) Accrual of cause of action :—

- (a) The cause of action in a suit by a Hindu, governed by the Mitakshara law, for possession of land, by annulment of illegal sales by his father, is the taking possession by the purchaser of what was the son's joint share of the family property, and the suit would be in time if brought within twelve years of such adverse possession. 23 W.R. 419; 5 B.L.R. Ap. 14.
- (b) A new cause of action does not accrue to the son, upon the subsequent birth of a younger brother, either to him alone or to him and his younger brother jointly. 8 W.R. 15 = B.L.R. Sup. vol. 781 (F.B.).

(2) Suit by the adopted son of a deceased partner :—

Where the members of a joint Hindu (Jain) family constituted a trading firm and one of them died, a suit by the son, adopted by the deceased's dissolution of the partnership and for rendition of accounts, brought widow, for within six years from the date of adoption, was within time, under arts. 126 or 127, the partnership not having been dissolved by the death of the deceased partner, and no dissolution, between his death and the adoption, having been proved. 20 P.R. 1897.

A son is not entitled to question his father's alienation made before his birth. The right of the son to set aside his father's sale does not descend to the grandson. 2 C.P.L.R. 141.

(3) Adverse possession against father is adverse against son :—

In the ordinary case of property, whether self-acquired or ancestral, held by a Hindu father as ostensible owner, adverse possession held against the father bars also the son. 9 B. 198 (224).

*1.—'When the alienee takes possession.'—(concluded).***(4) Suit by Hindu daughter:—**

A suit by a Hindu daughter for possession of immoveable property under a deed of compromise, brought more than twelve years after the date of alienation by her mother and the deed of compromise, is barred by limitation. 11 A.W.N. 109.

(5) Suit for partition—Sale in execution:—

A suit by a son to obtain a share, by partition, of the joint family property, the interest of the father having been sold in execution of a decree, is governed by art. 127, and not by this article. 8 C. 653.

(6) Sale by father during son's minority:—

Where a Hindu father mortgages his ancestral property during the minority of his son, a decree obtained by the mortgagee upon such mortgage will be treated as a decree against the father in his representative capacity, and the son will be left no interest in the property. 8 C.L.R. 428.

(Old Law).**Act XIV of 1857:—**

A suit, by a person to set aside an alienation made by his grandfather, and to recover the property on the ground that the alienation was invalid, against the alienor, who had been holding adversely for more than the statutory period, is barred by limitation. 8 M.H.C. 5.

127.—By a person⁽¹⁾ excluded⁽²⁾ *Twelve years.* When the exclusion from joint family property⁽³⁾ becomes known to the plaintiff.⁽⁵⁾ to enforce a right to share⁽⁴⁾ therein.

(Old Acts.)

[Art. 127 of Act IX of 1871.—Cols. 1 & 2.—Same as above, except that for the word 'person' in the present article, there was the word 'Hindu' in the 1st Column. Col. 3.—When the plaintiff claims and is refused his share.

*S. 1, cl. 13 of Act XIV of 1859.—To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property—the period of twelve years from the death of the person from whom the property alleged to be joint is said to have descended * * * or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share, * * *].*

(Notes)

Scope of article.

(1) Necessity for existence of joint family property :—

For this article to apply, there must be in existence joint family property, and the plaintiff must have been excluded from participation in the enjoyment thereof. 5 C. 988.

(2) Act IX of 1871 and Act XV of 1877 compared :—

Under art. 127, Act IX of 1871, a suit for partition was required to be brought within twelve years from the time when the plaintiff claimed and was refused his share; but under this article it must be brought within twelve years from the time the exclusion of the plaintiff becomes known to him. Thus the period of limitation in the present Act is shorter than that in the previous Act. 7 C. 461 = 9 C. L.R. 218.

(3) Suit for dissolution of partnership and for accounts :—

A suit for dissolution of partnership and for rendition of accounts, brought by the adopted son of the widow of a deceased partner, within six years from the date of adoption, was not barred, whether art. 126 or this article applied to the case. 20 P.R. 1897.

(4) Suit for property already partitioned :—

(a) Where, on the allegation that he had obtained possession of a share in the property left by the common ancestor of himself and defendant and then entrusted the share to defendant, the plaintiff brought a suit to recover the share, the suit was held governed by art. 144. 97 P.R. 1890.

(b) A suit to recover possession of certain property, on the ground that it fell to the share of the plaintiff in a family partition and that defendant purchased it in execution of a decree obtained against another member of the family, held governed by art. 144 and not this article. 18 B. 513.

(5) Suit for share in amount of bond :—

Where, after separation between two brothers, the amount due under a bond, which stood in their joint names, was realized by one of the brothers, a suit by the other brother to recover his share in the amount so realized was governed by art. 62 and not by this article. 6 A. 442.

(6) Suit to recover inheritance :—

(a) This article will not apply to a suit for possession of immoveable property by right of inheritance. 10 A. 349 = 8 A.W.N. 36.

(b) This article has no application to a claim to inherit property as a daughter's son. 11 C.L.R. 812.

(7) Partition main relief—Setting aside deed ancillary relief :—

Where partition is the substantial relief and the setting aside of a deed is only an ancillary relief, this article will apply and not arts. 91, 92 and 93. 18 B. 186.

Scope of article—(continued).

(8) Dispossession from joint family property:—

This article, and not art. 143, applies to a suit by a Hindu, who, having been dispossessed of, or having ceased to enjoy, joint family property, seeks to establish his right to a share in it. If, therefore, there is no allegation on defendant's part that there was a demand by plaintiff and a refusal by himself (defendant) more than twelve years before suit, the suit will not be barred. 7 B. 297.

(9) Suit for a share in outstandings realized since partition:—

A suit for share in debts left undivided at a partition of a joint Hindu family, afterwards realized by one of the members, is governed not by this article but by art. 62. 24 C. 309.

(10) Suit for maintenance of possession:—

A——— in certain joint family property, by cancellation of a deed of sale, executed by another co-parcener, affecting plaintiff's interest in the property, is governed by art. 120 and not by this article. 16 A. 73 = 14 A.W.N. 1.

(11) Not applicable to strangers:—

(a) This article applies only to cases between members of a family. Art. 144 applies to a claim for partition against alienees, strangers, in possession of the property. * 23 B. 137.

(b) A suit by a co-parcener against a mortgagee for partition of the property in the latter's possession, having been mortgaged to him by another co-parcener, was governed by art. 144. 1 P.L.R. 1903.

(c) This article has no application to a suit where the plaintiff is a stranger, who has purchased a share in joint family property from one of the members thereof. 14 C. 544.

(d) Art. 133, and not this article, applies to a suit by a purchaser of a share in a joint family property, whose vendor was out of possession at the date of the sale. *Per* Garth, C.J.

Art. 144 would apply to such a suit. *Per* Ghose, J. 11 C. 680.

(12) Suit for partition and account of taluqdari estate:—

A suit for partition and account of a *talukdari* estate is governed by this article and not by art. 120. 14 C. 493 (P.C.) = 14 I.A. 37.

Applicability of article to Mahomedan families.

(N.B.)—On this point there is a divergence of views. The Bombay High Court has decided that the article is applicable to Mahomedan families; whereas the High Courts of Allahabad, Calcutta, and Madras, and the Chief Court of the Punjab, are of opinion that this article is inapplicable to such families:—

BOMBAY CASES.

(1) This article applies to a suit by a Mahomedan for partition of joint family property. 14 B. 70.

(2) The possession by a Mahomedan co-sharer of property, which he has redeemed from a mortgagee, does not become adverse to the other co-sharers until some exclusive title is set up. 16 B. 491.

Applicability of article to Mahomedan families—(concluded).

CALCUTTA CASES.

- (1) This article is inapplicable to a suit by Mahomedans for possession by right of inheritance of shares in the property of their deceased ancestors. 22 C. 954.
- (2) This article presupposes the existence of a joint family. Consequently, a suit by a Mahomedan woman, who lived with her husband since her marriage, to recover her share in her father's property, has been held to be governed by art. 120 and not by this article. 7 C.W.N. 155.
- (N.B.)—Compare the two W.R. cases noted below.
- (3) From the plaintiff's residence and mess with her brother, inference could be drawn that she was in the enjoyment of the patrimonial estate jointly with her brother. 11 W.R. 45.
- (4) The collection of rents and profits of the family property by a member thereof does not constitute his possession adverse as against his mother and sister, so long as they mess and live jointly with him. 24 W.R. 1.

ALLAHABAD CASES.

- (1) This article will not apply to a suit by members of a Mahomedan family for recovery of shares in immoveable property, of a common ancestor deceased, in the possession of the defendants. 13 A. 282; 11 A.W.N. 88. Cf. 10 A. 109=8 A.W.N. 48, (No. 7 under Heading No. 3), *infra*.
- (2) A suit, brought by a sister of a deceased Mahomedan against the widow, to recover her share in a pension by right of inheritance, within twelve years, is in time under either this article or art. 131. 9 A. 213=7 A.W.N. 22.
- (N.B.)—In this case, the point whether this article would apply to Mahomedans was left an open question.

MADRAS CASES.

(1) Meaning of 'joint family property':—

The words 'joint family property' are intended to refer to joint family property in the Hindu sense of the term. The article is inapplicable to suits by Mahomedans. 15 M. 57.

(2) Suit by Mapla widow:—

A suit by a Mapla widow to recover her share in her deceased intestate husband's property was governed by art. 123 and not by this article, since the suit was for a distributive share of the property of an intestate. 15 M. 60.

PUNJAB CASES.

A suit for a share in property, to which the plaintiff became entitled under a will executed by the deceased owner thereof, was not governed by this article, since the parties were Mahomedans. 86 P.L.R. 1902.

Suit by Mahomedan daughter:—

In the absence of proof of joint family, a suit by the daughter of a Mahomedan owner to recover her share in her father's property, brought more than twelve years after the owner's death, was barred. 89 P.R. 1888.

Applicability of article to Burmese Buddhists.

- (1) A suit by Burmese Buddhists as joint heirs, against other joint heirs and their allies, for recovery of a specific share in joint family property, must be brought within twelve years from the time the exclusion from share became known to plaintiff. L.B.R. (1893—1900), 182.
- (2) Whether the article applied to Burmese Buddhists doubted. L.B.R. (1893—1900), 415.
- (3) The expression 'joint family property' in this article does not apply to property held jointly by members of a Burmese Buddhist family. L.B.R. 1903, p. 184.
- (4) The article is inapplicable to suits by Burmese Buddhists; among them there is no joint family system as among the Hindus. 2 U.B.R. (1897—1901), 458.

1.—'Person.'**(1) Meaning of:—**

The word 'person' means some person claiming a right to share in joint family property, on the ground that he is a member of the family to which the property belongs. 18 C. 642. Compare 14 M.I.A. 1, 11 C. 680 and 14 C. 544.

(2) Purchaser from a co-parcener:—

- (a) The rule that the possession of one co-parcener is the possession of all, for purposes of limitation, has no application as between a purchaser from one of the co-parceners and the other members of the family. 12 M. 292.
- (b) Similarly, the rule has no application where the party claiming has been clearly excluded from the family. 10 M.I.A. 511.

2 — 'Excluded' — 'Exclusion.'**(1) Meaning of the word:—**

The word 'excluded' implies previous inclusion. 5 C. 938 (910).

(2) What constitutes exclusion, and what not:—

- (a) When a party is not in possession of any joint property and does not receive any of the proceeds of the property, he is said to be excluded; but not when he is living on the property with the other joint owners and is maintained out of the income of the family. Exclusion, to operate as a bar, must be entire exclusion. 11 M. 380 (at p. 392); confirmed on appeal, 14 M. 237 (P.G.) = 18 I.A. 45; see also 3 M.H.C. 99; Cf. 2 M.H.C. 347.
- (b) In order to constitute exclusive possession or enjoyment by defendant, there need not be any evidence of an express refusal to allow the plaintiff any part of the benefits of the joint property. 4 M.H.C. 354.
- (c) An exclusion from all ancestral property is not necessary to give rise to a bar by limitation; what has to be considered is the property out of the plaintiff's possession, in which he claims a share. 86 P.R. 1886.
- (d) The fact that the plaintiffs were not excluded from their share, in part, of the joint property, does not prevent this article from operating in respect of another part, from which they had been excluded to their knowledge. 21 B. 325.

2.—'Excluded'—'Exclusion.'—(continued).

- (e) Denial, by the managing member of a Mahomedan family, of plaintiff's title to recover his share of money representing his (plaintiff's) share of profits of common land deposited with the defendant, is not 'exclusion from joint family property' within the meaning of this article. 10 A. 109—8 A.W.N. 8.
- (f) Where, while the plaintiff was in Government service and away from his village, his brother managed the joint family property and, during this period, the brother wrote a letter to the plaintiff requesting him to return to the village and manage his share of the property or employ some person to manage it for him, *held*, under the circumstances, the possession of the latter was not as his own in exclusion of the plaintiff. 11 B. 365.
- (g) Mere proof of refusal on the part of a widow to live with her co-widows or of non-participation by her in the family property, did not establish ouster or exclusion by the co-widows, according to this article. 24 M. 441.
- (3) **Assertion of self-acquisition not adverse possession :—**
Unless actually excluded, the possession by the defendant of certain property, on the allegation that it was his self-acquired property, would not constitute adverse possession, as against the plaintiff, his co-parcener. 3 C.P.L.R. 41.
- (4) **Suit by members of Alayasantana family :—**
A——, who had separated themselves from the family more than 12 years before suit, and having been excluded to their knowledge for more than 12 years prior to suit, *held* governed by this article and barred. 15 M. 186.
- (5) **Member whose share has been sold :—**
A suit by a member of a family, against the purchaser of that share from another member, during plaintiff's minority, is governed by this article, the plaintiff, in such a case, being a person 'excluded from joint family property.' 2 O.O. 348.
- (6) **Suit to recover inheritance :—**
A suit to recover certain property as an inheritance, brought more than 12 years after the plaintiff's exclusion from the property, and under circumstances that the exclusion must have been known to him, was barred by limitation. L.B.R. (1893-1900), 530.
- (7) **Possession of one member possession of all :—**
Possession of one member of a joint Hindu family is possession of all. 1 W. R. 74.
- (8) **Burden of proof :—**
(a) A suit to recover a certain share in joint family property, by a person excluded therefrom is governed by this article and not by art. 142; and the *onus* lies on the defendant to show that the exclusion became known to the plaintiff for more than 12 years before the suit. 1 C.W.N. 548.

2.—'Excluded'—'Exclusion.'—(continued).

- (b) Where the plaintiff, in a partition suit, proved that the family property was joint and that he had a share in it, it lay, then, on the defendant to show that, to his knowledge, the plaintiff was excluded from the joint estate for more than twelve years before suit. 22 B. 259.
- (c) Where a suit is brought to enforce the plaintiff's right to a share in immoveable property on the ground that it is family property, it is incumbent on the plaintiff to show that the estate was, within twelve years before suit, in the possession of persons claiming under his ancestor. 6 W.R. 170.
- (d) Where limitation is pleaded in a partition suit, the burden lies on the defendant to prove that there was a demand and refusal of plaintiff's share in the family property or that the plaintiff was to his knowledge excluded from the family more than twelve years before suit; in the absence of such proof, no question of limitation would arise. 18 B. 197.
- (e) Where portion of a joint family property, left undivided on the occasion of a general partition, had remained, for more than twelve years from that time, in the exclusive possession of one member, another member, who brings a suit for partition of that property after such lapse of time, must show that there was some agreement or acknowledgment of title by the member in possession, preserving his own right in the property, or the suit will be barred. 11 B. 216.
- (f) Where, in a suit for partition, it is proved that the defendant was in exclusive enjoyment of the property, in which a share is claimed, for a very long time before suit, the presumption in favour of the joint possession of joint family property would be supplanted, and the plaintiff must prove facts which would show that the defendant's exclusive possession was consistent with the preservation of his right to a share in the property. 11 B. 220, 221 Note.
- (g) Where it is found, in a partition suit, that the property in dispute was in the name and possession of the defendant, the burden lies on the plaintiff to prove that the defendant made the purchase out of ancestral funds and that the plaintiff was in receipt of his share of the income thereof, and the defendant need not prove that it was his self-acquired property or that it was in his exclusive enjoyment. 25 B. 367: *Compare*, 18 B. 513.

(9) No allegation of permissive possession :—

Where there was no allegation that the defendant's possession was permissive or that the plaintiff was unaware of the exclusive possession by the defendant, a suit to obtain a declaration that the land in the defendant's possession was the property of the plaintiff's family, brought more than 12 years after possession by defendant, was barred by limitation, whether this article or 142 or 144 applied to the case. L.B.R. (1893-1900), 522.

(10) Joint possession :—

So long as members of a joint family live together in commensality and in joint possession of the family property, no cause of action arises to one of

2.—‘ Excluded ’—‘ Exclusion. ’—(concluded).

them for the recovery of his share. Dispossession gives him cause of action, and limitation begins to run against him from that date. 19 W.R. 344.

(11) Possession of home-staying brother :—

The fact, that a home-staying brother was in possession of the family property would not prevent the other brother, who was abroad, from claiming his right of inheritance to his father's property, unless the possession of the home-staying brother was proved to be adverse to the absent brother. 9 W.R. 98.

(12) Remedy of excluded co-proprietor :—

A member excluded from joint possession is not bound to sue for partition of the whole property; he may sue for a declaration that the property is joint and for a decree for joint possession. 3 C.P.L.R. 41.

3.—‘ Joint family property. ’**(1) Moveables left by deceased Zemindar :—**

The personal property of a Zemindar left at his death is joint property, divisible amongst his sons after his death. 5 M.H.C. 31.

(2) Suit to recover share in property redeemed :—

A suit to recover a share of undivided ancestral property, mortgaged by a common ancestor and redeemed by a co-heir of plaintiff, is governed, for purposes of limitation, by art. 148 and not by this article. U.B.R. (1892-96), 490. *Compare Ibid*, 487.

(3) Suit for partition of property reserved at a previous partition :—

A suit, for partition of family property reserved in common at a previous partition, brought within twelve years from the date of demand and refusal, was not barred. 18 M. 418; 17 M. 362.

(4) Claim to share in common fund :—

A———by contributors to such fund is not one relating to joint family property within the meaning of this article. Such a suit is governed by art. 120. 23 M. 589.

(5) Stranger not a member of joint family :—

A stranger to an undivided Hindu family does not become a member of such family by the circumstance that he joins, in purchasing property, with members of the family and his name is entered in the Revenue Records as co-proprietor with the members of the family. He does not, on that account, become entitled to the rights of a member of a joint Hindu family. 9 M. 482 (P.C.) = 13 I.A. 147.

(6) Desai vatan :—

A suit, for partition of property held as appertaining to the office of a *desai*, was allowed, notwithstanding the fact that the management thereof descended upon a single member of a particular branch of the family since the date of its grant to the family (1768). 7 C.W.N. 409 (P.C.)

3.—‘Joint family property.’—(concluded).**(7) Money being value of share of profits:—**

Money, representing the value of plaintiff's share of profits derived from land common to himself and another member, and deposited with the latter, the parties being Mahomedans, is not ‘joint family property’ within the meaning of this article. 10 A. 109 = 8 A.W.N. 8.

(8) Separation in residence no separation of property:—

A separation in residence and mens by a member of a joint family did not affect his position in relation to his ancestral property until a partition thereof. 25 W.R. 116.

(9) Presumption:—

There is no ——— that, when a family breaks up, the family property remains undivided. 2 U.B.R. (1892—1896), 444.

(10) Burden of proof:—

(a) Before a plaintiff can bring his case within this article, he must show that the property in which he seeks to recover a share is joint property. 9 C. 237.

(b) In respect of a suit regarding partition of family property, the claimant must show some possession or enjoyment of the land on the part of himself or of those under whom he claims, within 12 years of the date of suit. U.B.R. (1892—96), 437.

4.—‘To enforce a right to share.’**Meaning of phrase:—**

This article provides for a suit ‘to enforce a right’ (not ‘to establish a right’), and by this phrase is intended a claim for actual possession. Thus, this article is meant to apply to suits for partition, whether the whole family property has remained joint, or whether on a partition one portion has been left undivided. What would bar the operation of this article in the latter case, would be a possession of that portion conceded to, and taken by, one of the sharers as the common property of himself and the other sharers. 15 B. 135 (143).

5.—‘When exclusion becomes known to the plaintiff.’

(1) *In a suit to obtain a share by partition of a joint family property, the interest of the plaintiff's father having been sold in execution of a decree, limitation is to be computed from the time when exclusion from his share first becomes known to the plaintiff. 8 C. 653.*

(2) *In a suit for partition, the mere possession of the property by the defendant for more than twelve years before suit would not operate as a bar by lapse of time; time would not run against plaintiff until his exclusion (if he was excluded) from the property had become known to him. 6 B. 741; 10 B. 24.*

(3) *Not only must the plaintiff have been excluded from the family property, but his exclusion must also have been known to him. 6 Bom. L.R. 925.*

.5.—‘When exclusion becomes known to the plaintiff.’—(concluded).

- (4) For the article to apply, the property in dispute must be joint family property and the plaintiff must have been excluded from the enjoyment thereof. 5 Bom. L.R. 355.
- (5) It is essential that there was an exclusion more than twelve years prior to suit to the knowledge of the plaintiff. 4 Bom. L.R. 135.
- (6) A suit for a share in a joint property, brought more than twelve years after exclusion to the knowledge of the suitor, would be barred. 11 C. 777 = 12 I.A. 112 (P.C.)

(7) Receipt of benefit from joint estate:—

- (a) Where the plaintiff in a partition suit was found to have mainly resided away from the locality of the property for many years before suit, it was the duty of the Court to have found out whether the plaintiff had received any benefit from the joint estate at any time within twelve years before suit. 11 B. 461 (Note).
- (b) Under S. 1, cl. 13, Act XIV, a suit for partition brought by one member of a joint family will not become barred if a share or benefit had been received by the plaintiff-member within twelve years previously to the repeal of that Act. If the remedy had thus been kept alive when Act IX of 1871 or Act XV of 1877 came into force, the period of limitation under these would be reckoned from demand and refusal or exclusion; or the suit will be barred. 11 B. 455.

(8) Exclusion—Burden of proof:—

- (a) In joint ancestral property, the possession of one co-sharer is the possession of all. The co-sharer in possession must prove that the plaintiff was to his knowledge, excluded more than twelve years prior to suit. 118 P.R. 1889.
- (b) Where a family is admittedly not joint, the burden, in a partition suit, lies on the plaintiff to remove the bar of limitation by showing some sort of possession by himself within 12 years before suit. 14 C. 610.

(9) Plaintiff living in foreign country—Entry in Settlement Papers:—

Where certain property was recorded in the joint names of the plaintiff and defendants, and the plaintiff lived in a foreign country, for more than twelve years, taking no part in the management of the property, a suit by the plaintiff for possession of the property, instituted soon after he heard that it was recorded in the names of the defendants in the Settlement Papers, was not barred, since there was no exclusion of possession till the entry in the Settlement Papers. 18 P.R. 1886.

(Old Law.)

Suit under Act IX of 1871:—

In a suit by a Hindu, excluded from joint family property, to enforce a right to a share therein, brought before the 1st October, 1877, the period of limitation was computed under this article, and not under art. 143 of that Act. 3 C. 228.

Cases under Act XIV of 1859.

(1) Participation of profits:—

- (a) Where the plaintiff, in a suit for a share of family property, failed to prove his participation in the profits for more than twelve years, when Act XIV of 1859 was in force, the suit was barred, the later Act not reviving the right barred by the Act of 1859. 142 P.R. 1890.
- (b) A suit for a share of joint family property was required to be brought within twelve years from the last participation of the profits by the plaintiff, the burden of proving which lay on the plaintiff. 12 B.L.R. 219-19 W.R. 192; 2 B.L.R.A.C. 284.
- (c) Proof of payment was not necessary to bring a case within—; common enjoyment was sufficient to bring a case within—. 17 W.R. 530.
- (d) A suit for a share of the family property, not brought within twelve years from the date of the last participation in the profits of it was barred under S. 1, cl. 13 of Act XIV of 1859; an alteration in the law of limitations did not revive the right so extinguished. 12 M. 26=15 I.A. 167 (P.C.)
- (e) Where, within twelve years before suit, two brothers lived in the same mess, the elder collecting the rents and profits and managing the family expenses, the claim of the plaintiff to the share of one of the brothers was not barred. * 22 W.R. 185.

(2) Payment on account of share:—

- (a) In a suit to enforce the plaintiff's right to a share in certain property, it is not enough to find that the plaintiff had occasionally received money from the defendant, but there must be a distinct finding as to what payments, if any, have been made to the plaintiff within twelve years before suit, by the person in possession or management of the property, on account of the plaintiff's alleged share. 17 W.R. 451.
- (b) Residence and mess in the family is sufficient to constitute participation and to show that a member was receiving payment on account of his share. 11 W.R. 838.

(3) Burden of proof—Payment:—

- (a) Proof, by the plaintiff, of receipt of payment on account of his share within twelve years before suit, would shift the burden of proof on to the defendant, who must then prove his plea of separate property. 3 W.R. 173.
- (b) S. 1, cl. 13 of Act XIV of 1859 applied to the case of a son claiming partition of joint family property after the death of his father; but, in strictness, the clause would not apply to suits by persons governed by the Mitakshara, because, under it, the son would be a co-owner with the father in ancestral property. 7 B. 297.

(4) Act XIV of 1859, s. 1, cls. 13 & 16:—

- (a) A suit to establish a right to share in a *vatan* and to recover a portion of the profits for seven years, was governed by cl. 13. 4 Bom. H.C. A.C. 55.

Cases under Act XIV of 1859—(concluded).

- (b) A suit to enforce the right to share in a joint family property must be brought within twelve years, exclusive of the period during which the property was under attachment by Government and neither party was in possession. 10 Bom. H.C.A.C. 228.
- (c) A suit to recover the plaintiff's share in his father's property, brought more than 12 years after his father's death, was barred, since no payment to him was proved within 12 years before suit by the person in management of the family property. 11 W.R. 72.
- (5) **Mahomedans :—**
 Cl. 13, S. 1, Act XIV of 1859, applied to Mahomedans as well as Hindus. 5 W.R. 293.
- (6) **Limitation against adopted son :—**
 As against an adopted son, suing for his share of the ancestral estate, the limitation began to run from the date of demand and refusal. 1 M.H.C. 45.

General.

- (1) **Suspension of limitation :—**
 Where a person is estopped by a decree of a competent Court from bringing a suit within the lifetime of a certain person, limitation will be suspended against him whether the decree was founded on a correct or erroneous view of the law. 7 C.L.R. 320 (P.C.)—5 B. 48—14 B.L.R. 973—7 I.A. 181.
- (2) **Partition during minority of a member :—**
 A partition of family property can be effected during the minority of one of the members of the family: if the partition be unfair or prejudicial to the minor's interest, he may set it aside on his attaining majority. 7 C. W.N. 578 (P.C.)
- (3) **Effect of claim for partition being barred :—**
 Though limitation may be a bar to a suit by the son for partition, his right as co-parcener is not thereby destroyed, he being nevertheless entitled to relief as against the improper disposal by the defendant of more than his proper share of the property. 4 M.H.C. 60.
- (4) **Conversion of ejectment suit into partition suit not allowed :—**
 Where a member of a joint Hindu family, alleging division, sued for ejectment of the persons in possession of the property, but failed to prove division, he could not be entitled, in second appeal, to treat his suit as one for partition. 12 M. 292.
- (5) **What constitutes partition :—**
 In order to constitute partition, a separation by metes and bounds is not necessary; a separation in estate and interest is sufficient. 7 C.W.N. 578 (P.C.).
- See also 8 W.R. 1 (P.C.)—11 M.I.A. 75.**

General.—(concluded).

(6) Evidence of partition :—

Where an informal partition took place between the members of a joint family and the members continued to be in possession of their shares without any intention of readjusting the portions so partitioned, a subsequent claim by one of them to another partition was not allowed. 18 C. 302 (P.C).

(7) Suit by Malabar Tarwad :—

A suit by six divided branches of a Malabar *tarwad*, against a seventh divided branch for their shares of the property, which had belonged to an eighth-branch which became extinct, *held* governed by article 124, and not by this article. 4 M.L.J. 43.

(8) Management of temple by rotation :—

Where the management of a public religious institution devolved by rotation on the senior branch of the hereditary trustees for more than twelve years, to the exclusion of the members of the junior branch, the right of the members of the junior branch became extinguished, whether this article or article 124 or 142 is applicable to the case ; it is immaterial that no member of the senior branch was in continuous possession for twelve years. 13 M.L.J. 341 = 27 M. 192.

128.—By a Hindu for arrears of *Twelve years*. When the arrears are maintenance. payable.

129.—By a Hindu for a declaration *Twelve years*. When the right is denied. tion of his right to maintenance.

(Old Acts.)

(N.B.)—The above two articles, 128 & 129, have taken the place of art. 128 of Act IX of 1871 & S. 1, cl. 13 of Act XIV of 1859.

[Art. 128 of Act IX of 1871.—By a Hindu for maintenance—Twelve years—when the maintenance sued for is claimed and refused.

S. 1, cl. 13 of Act XIV of 1859.—

* * * *

*to suits for the recovery of maintenance where the right to receive such maintenance is a charge on the inheritance of any estate—the period of twelve years * * * from the death of the persons on whose estate the maintenance is alleged to be a charge ; or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such maintenance.]*

(Notes)

Scope of article.

(1) Suit upon an *ekrar*—Right not based on Hindu Law :—

A suit upon an *ekrar* executed by the priest of an idol, for recovery of arrears of maintenance, is not governed by either of these articles, as these apply only to cases in which the right of maintenance is based upon the Hindu Law. 28 C. 645.

(2) Case of Mahomedan widow :—

A Mahomedan widow is not entitled to maintenance out of her husband's estate in addition to what she is entitled to by inheritance or under his will. 25 C. 9.

1.—'Arrears.'

(1) Right to arrears—demand and refusal essential :—

In a suit for arrears, the plaintiff cannot succeed unless he or she proves demand and refusal or wrongful withholding of the same. 17 M. 362; 18 M. 403; 24 M. 147 (P.C.) - 5 C.W.N. 74; 6 M.L.J. 147; 17 B. 45. Cf. 7 M. 341; and 26 M. 291 (at top of p. 298).

(2) Allowance of arrears matter of discretion :

The allowance of arrears of maintenance is a question for the discretion of the Court; it need not allow arrears at the same rate as it may allow future maintenance. 21 A. 183.

(3) Arrears for what period recoverable :—

A Hindu widow can recover arrears of maintenance for any period, unless it appears that there has been a demand and refusal, in which case she can recover arrears for twelve years only from the date of such demand and refusal. 8 B. 207.

(N.B.)—This was a case under Act IX of 1871.

(4) Discontinuance of receipt of maintenance :—

Where, notwithstanding a decree declared the right of the plaintiff to receive certain cash allowances annually from the Government, called *makasa amals*, he failed to receive the allowance continuously for more than twelve years, a suit by him to recover the arrears was barred, inasmuch as the right to the periodical payment was barred. 11 B. 222.

N.B.—The suit was, moreover, held not cognizable by the Civil Courts.

2.—'Maintenance.'

(1) Liability of father-in-law to maintain daughter-in-law :—

Though a Hindu father-in-law is not under a legal obligation to maintain his widowed daughter-in-law from out of his self-acquired property, his surviving son will, after his death, be under a legal obligation to maintain his sister-in-law from out of the property inherited by him from his father. 11 A. 194 (F.B.) 29 C. 557 (568).

(2) Rights under Bengal school and those under Mitakshara :—

There is no valid ground for making any distinction between rights of maintenance under the Bengal law and under Mitakshara law. 29 C. 557.

2.—'Maintenance.'—(concluded).

(3) Maintenance charged on land :—

Where a maintenance was charged upon immoveable property, a suit for arrears within twelve years was not barred. 9 C. 945=18 C.L.R. 390=10 I.A. 45 (P.C.)

(4) Rate reduced by agreement :—

Where the person entitled to maintenance has agreed to receive a less sum for a defined period than the amount fixed, he could obtain a decree for the allowance for that period only at the reduced rate. 9 C. 945=18 C.L.R. 390=10 I.A. 45 (P.C.).

(5) Separation from husband's house :—

A Hindu widow does not lose her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purpose of unchastity or for any other immoral purpose. 29 C. 557.

(6) Cause of action for maintenance :—

Where maintenance is withheld under circumstances amounting to a refusal, such withholding would give rise to a cause of action, even though there was no specific demand therefor. 3 B. 415=6 I.A. 114=6 C.L.R. 162 (P.C.).

(7) Conditions requisite for receipt of maintenance :—

Where the will of a Hindu did not constitute the residence of his wife in his ancestral house, with his son, a condition precedent to entitle her to maintenance, a separation by her from the ancestral house did not disentitle her to maintenance suitable to her rank and condition. 3 B. 415=6 C.L.R. 162=6 I.A. 114 (P.C.).

(8) Custom of allowing maintenance to junior branches :—

Where, in a *deshpande vatandar's* family, a practice was found, extending over a considerable length of time, of providing the younger branches with maintenance only, the practice was recognized and acted upon as a legal and valid custom. 10 B. 327.

General.

(1) Res judicata :—

(a) Where, in a family in which property descended to the eldest male member alone, a suit by the plaintiff, a younger member, against his father for monthly allowance for maintenance founded upon an *ekranama* failed, a subsequent suit by him after his father's death against his eldest brother for the allowance due to him was not barred by the rule of *res judicata*. 9 C. 945=18 C.L.R. 390=10 I.A. 45 (P.C.).

(b) Where a person entitled to maintenance asks for, and obtains, not only a decree declaratory of his right to claim maintenance, but also one for future maintenance, he cannot bring a separate suit for arrears of future maintenance. 12 M. 183.

(c) The matter would be different, if the decree obtained was one only declaring his right. 7 M. 80.

General.—(concluded).

(2) Barred claim cannot be revived :—

A claim once barred cannot be revived by a change in the law of limitation. This principle applies as well to a claim for arrears of maintenance or any other claims, as to one for possession of land. 3 G. 331.

(3) Hindu Law no bar to recover arrears :—

The Hindu Law does not preclude the recovery of arrears of maintenance. It is only the law of limitation that bars the right to recover arrears. 2 M.H.C. 36.

(Old Law).

Cases under Act XIV of 1859.

- (1) Where, in a suit for arrears of maintenance by a Hindu widow governed by the *Alayasantana* Law, it was found that the widow had not, for twenty years before suit, the plaintiff had been living away from the family without claiming any maintenance or receiving anything from the family to support himself, it was *held* that the suit was barred. 4 M. H.C. 137.
- (2) Cl. 13 of S. 1, was held inapplicable to a suit for maintenance when the right to receive such maintenance was not a charge on the estate of a deceased person but on the estate of a living person. 4 W.R. 84.
- (3) A suit for maintenance, not chargeable upon any estate, must be brought within six years from the date of demand and refusal thereof. 2 B. 637.
- (4) Under the Limitation Act of 1859, in a suit for maintenance, the time begins to run from the date of defendant's refusal to maintain the plaintiff. 12 M. 347.
- (5) Execution limited to less than three years :—
The issue of process of execution for arrears of maintenance was limited to a period less than three years before the application, where there was a decree for payment of a sum of money annually for maintenance. 4 M.H.C. 275.
- (6) In a suit by the widow of a deceased undivided brother against the survivor for maintenance, the starting-point for limitation *held* to begin from the date of her husband's death. 7 M.H.C. 226.

130.—For the resumption or as- *Twelve years.* When the right to
 sessment⁽¹⁾ of rent-free resume or assess
 land.⁽²⁾ the land first
 accrues.⁽³⁾

(Old Acts)

[Act IX of 1871.—Same as above : except that the proviso, *viz.* "Provided that no such suit shall be maintained where the land forms part of a permanently settled estate, and has been held rent-free from the time of the Permanent Settlement" does not find a place in the present article.

(Old Acts).—(concluded).

S. 1, cl. 14 of Act XIV of 1859.—To suits by the proprietor of any land or by any person claiming under him, for the resumption or assessment of any lakhiraj, or rent-free land—the period of 12 years from the time when the title of the person claiming the right to resume and assess such lands, or of some person under whom he claims, first accrued. Provided that, in estates permanently settled, no such suit, although brought within twelve years from the time, when the title of such person first accrued, shall be maintained if it is shown that the land has been held lakhiraj, or rent-free from the period of the Permanent Settlement].

(Notes)

1.—‘For the resumption or assessment.’

(1) Suit for declaration :—

A claim by plaintiff for a declaration that he has a right to realise the revenue of land, which was revenue-free prior to Settlement, but assessed to revenue at the Settlement, would not be barred by this section, as the suit is not ‘to resume or assess rent-free land.’ 1 C.P.L.R. 30.

(2) Reservation of rights of Government :—

There is no period of limitation prescribed by any law, within which alone the Government should exercise its prerogative of imposing assessment on land liable to be assessed with public revenue. 27 M. 16 (approving S.A. No. 1352 of 1897).

(3) Effect on non-execution of decree :—

When a person, having obtained a resumption-decree in his favour, rendering certain land liable to assessment, lies idle, for more than twelve years, without executing the decree, he cannot, subsequently, resist successfully a suit against him for a declaration that the lands were rent-free lands. 5 C. 949=6 C.L.R. 260.

2.—‘Rent-free land.’

(1) Meaning of the term :—

The words “rent-free” in cl. 14, s. 1 of Act XIV of 1859 merely showed the meaning of the term “lakhiraj”; and the section applied only to cases in which lakhiraj title was in dispute. 2 W.R. Act X Bulings, 33.

(2) Lakhiraj grants :—

As to the law applicable to the resumption and assessment of lakhiraj grants, see 8 C. 230=10 C.L.R. 41; 20 W.R. 459 (P.C.) & 1 C. 378.

3.—'When the right.....first accrues.'

(1) Suit twelve years after resumption-decree:—

A suit for assessment of rent on *lakhiraj* land, brought more than 12 years after a decree for resumption, would be barred. 16 C. 449 & 450 (Note).

(2) Cause of action accruing on date of sale:—

A suit by the plaintiff, who has purchased the estate from the purchaser at a revenue sale, to resume the land, must be instituted under this article and art. 121, within twelve years of the revenue-sale, and not from the date of the sale becoming final. 22 C. 244 (250, 251).

(3) Suit by a succeeding *ghatwal*:—

A suit by a succeeding *ghatwal* to resume land, granted by his predecessor on permanent tenure, must be brought within 12 years after the succession to the estate. Otherwise, it will be barred. Art. 139 is inapplicable to such a case. 9 C. 411.

(4) Grant in lieu of maintenance:—

Where the grantee of a *mokurari* lease, in lieu of maintenance, gives the grantor or his successors a distinct notice of a claim, on his part, to hold the grant in perpetuity and not subject to resumption, the latter will be barred if he or they does not or do not sue within twelve years of such notice, at least for the time of his or their enjoyment. 3 C. 793.

(5) Suit for assessment of mal lands after obtaining declaratory-decree:—

Where plaintiff has obtained a decree declaring that the lands, in the possession of defendants and alleged to be *lakhiraj*, were plaintiff's *mal* lands, a suit by him (plaintiff) for assessment would not be barred, even though brought more than 12 years after the decree. 2 C.L.R. 569.

(6) Possession under an invalid grant:—

When the defendant was in possession of a portion of a *Zamindari*, for more than twelve years, on a claim of right, and it was found that the grandfather of the plaintiff had made a grant in favour of defendant, which was invalid, and the plaintiff sued for resumption, his suit was held barred. 3 M.H.C. 5.

(7) Person in possession not claiming under grantee:—

If the grant was one of office remunerated by the use of land, and if a person is in possession of the land without claiming from the grantee, for more than twelve years after the right to resume accrued, the right to assess the land would be barred. 1 B. 586.

(8) When possession becomes adverse—Service lands:—

When lands are held as remuneration for services, the fact that no services are rendered, would not, by itself, make the possession adverse. To make the holding adverse, there must be a refusal to perform service or a claim to hold the lands free of service. 23 B. 802.

3.—When the right.....first accrues.—(concluded).

(9) Right of purchaser from Government:—

When the plaintiff suing for resumption and assessment of land happens to be a purchaser from Government, he must date his right not from his purchase from Government, but from the time when the right first accrued to the Government. 23 W.R. 24.

(10) Zemindar barred—Putneedar-purchaser also barred:—

A *putneedar*, deriving his title from, and claiming under, the Zemindar, whose right to resume is lost, cannot, by reason of his being an auction-purchaser, revive a right which the Zemindar himself is no longer entitled to exercise. 1 W.R. 197.

General.

Burden of proof:—

- (a) Where the plaintiff, being the representative of an auction-purchaser, sets up that the land is *mal*, the burden of proof as to the land being *mal* lies on him. 1 C. 378 (following 8 B.L.R. 566 (P.C.)=14 M.L.A. 152).
- (b) In cases of suits for resumption or assessment of rent-free land, the plaintiff must prove that his land was once *mal*; if he proves this, the burden is shifted on to the defendant, who must then prove that his tenure existed from before 1790. 20 W.R. 459 (P.C.)
- (c) In a suit by an auction-purchaser to assess rent on land claimed as valid *lakhiraj*, the *onus* is on the ryot to prove that the land has been held as *lakhiraj* from 1790. 8 W.R. 182; 69.

(Old Regulations and Acts).

(1) S. 10, Regulation XIX of 1793:—

- (a) The word 'rent-free' could not mean revenue-free. Where grant of land was made by a Zemindar for valuable consideration to be held by the grantee without payment of rent, such land could not, under—be resumed by the heir of the grantor or the purchaser of the Zemindar. 9 W.R. 1 (F.B.)
- (b) Where the defendant proved possession of lands as *lakhiraj* before 1790, there could not be any resumption or assessment of the lands, unless the plaintiff proved the lands to be *mal* by payment of rent or otherwise. 8 W.R. 58.
- (c) There could not be a resumption of land, whether heritable *lakhiraj* or not, held from before 1790. A.D. 1 W.R. 248.
- (d) The grant of a rent-free tenure, not only of the proprietary right in the land, but also of the rents thereof undiminished by the payment of the revenue assessed thereon, the grantor undertaking to pay the same, is null and void and liable to resumption under S. 10 of Regulations XIX of 1793 and XLI of 1795. 2 A. 545 (F.B.)

(Old Regulations and Acts)—(concluded).

(2) Reg. II of 1805, S. 3, cl. 3:—

Peaceable possession without payment of rent for 60 years before the commencement of the suit barred a suit for rent under——. 5 W.R. 1 (P.C.)

(3) Cases under Act XIV of 1859, S. 1, cl. 14:—

(a) Under Act XIV of 1859, S. 1, cl. 14, a suit by a *dur-putneedar*, who purchased at a sale under Reg. VIII of 1819, to resume an alleged invalid *lakhiraj*-tenure, was required to be brought within twelve years from the date when the right to sue accrued to the person, under whom he claimed, and not from the date of his purchase. 1864 W.R. 170; 15 W.R. 436.

(b) Cl. 14, S. 1, Act XIV of 1859, applied to all suits to resume or assess lands, held rent-free, whether before or after the Permanent Settlement. 3 W.R. 38.

(c) Suits for resumption of *lakhiraj*, instituted after Act XIV of 1859 came into force, were governed by the provisions of cl. 14, S. 1 of the Act. 2 W.R. 258.

(d) Since Act XIV of 1859 came into force, the twelve years' limitation applied to a suit to resume or assess invalid *lakhiraj* created since 1790. 4 W.R. 53.

(e) A suit to recover a portion of a Zemindary granted to the defendant by the plaintiff's ancestors upwards of forty years before suit, on the ground that the grant was void, was held barred by limitation. 3 M.H.C. 37.

(4) Act XIV of 1859, s. 1, cl. 12:—

(a) A suit by a Zemindar to recover possession of lands belonging to the Zemindari and alleged by the defendant to be *lakhiraj*, was governed by the twelve years' limitation under—. In computing the period of limitation, the time of pendency of a suit for assessment not brought by him or his predecessor in title could not be excluded. 1 W.R. 39.

(b) The period of limitation was computed from the date on which the defendant began to hold the land in dispute rent-free. 7 W.R. 531.

(c) A suit not to resume or assess, but to recover possession, with income profits as part of the plaintiff's *mal* tenure of land which the defendant is alleged to be holding on an invalid *lakhiraj* tenure, was governed by cl. 12 of s. 1 of Act XIV of 1859. 7 W.R. 531.

131.—To establish ⁽¹⁾ a periodically *Twelve years*. When the plaintiff is recurring right. ⁽²⁾ first refused the enjoyment of the right. ⁽³⁾

[Act IX of 1871, art. 131.—Same as above.

Act XIV of 1859—No corresponding provision.]

(Notes)

Scope of article.

(1) *Tasdik allowance—Suit for declaration :—*

A suit for a declaration that the plaintiff is entitled to receive, as *Dharmakarta* of a temple, the *tasdik* allowance direct from Government, is governed by art. 120, and not by this article. 13 M.L.J. 267.

(2) *Suit for Kattubadi :—*

Kattubadi is not rent merely, but constitutes a charge on the land and is governed by the twelve years' limitation in this article and the next. 19 M. 103 Note=5 M.L.J. 142.

If it had not been paid for a period of over twelve years, the suit would be barred. 15 M. 161.

(3) *Suit to recover revenue on land :—*

A suit to recover the revenue on a certain land granted to the trustees of a mosque and confirmed by Government, is governed by art. 132, and not by this article; twelve years' arrears are recoverable. 10 M. 115.

(4) *Suit for declaration re remissions in revenue :—*

A suit against Government for a declaration of his right to have certain remissions made in the revenue, to which the plaintiff was assessed, no consequential relief having been prayed for and the remission having been refused by Government more than six years previously, was held governed by art. 120 and not by this article. 16 M. 294.

(5) *Malikhana :—*

A suit for——— is governed by art. 132, the same being a recurring charge on immoveable property. 5 C. 921 = 6 C.L.R. 183.

I.—'To establish.'

(1) *Meaning of words :—*

The words—are used as a correlative of "to set aside"; they do not refer to a mere declaratory suit. *Per Bhashyam Ayyengar, J.* in 26 M. 291 (F.B.) at top of page 314.

(2) *Suit for establishment of right :—*

If a suit be for the purpose of establishing a periodically recurring right, pure and simple, this art. would apply and the period of limitation would be reckoned from the date when the plaintiff was first refused the enjoyment of the right. 10 C. 697.

(3) See No. 1, 14 M.L.J. 477 under Heading No. 2, *infra*.

(4) See No. 9, 2 C.W.N. 689 under Heading No. 2, *infra*.

(5) See No. 11, 9 A. 213 = 7 A.W.N. 22 under Heading No. 2, *infra*.

(6) See No. 4, 16 M. 294, and No. 1, 13 M.L.J. 267 under "Scope of article," *supra*.

2.—‘Periodically recurring right.’

(1) Right to recover rent:—

A suit to establish the right of plaintiff to recover rent is governed by this article. 14 M.L.J. 477.

(2) Claim for rent a recurring cause of action:—

(a) A ——— is a recurring cause of action. So, a tenant may, in a suit for rent, set up, as against the claim for any particular year, any right which he has to a deduction or abatement, notwithstanding the fact of his payment of the full rent for several previous years. 16 W.R. 201.

(b) Failure to pay rent gives rise to a recurring cause of action. So, where the right to take rent is admitted, no question of limitation can arise. 4.C. 661.

(3) Claim for monthly allowance:—

A claim for a monthly allowance from a Zemindari is a recurring right and is governed by this article. 7 M. 341.

(4) Right to receive offerings at a shrine:—

A suit, by plaintiffs, for a declaration of their right to recover a moiety of the offerings made at a shrine, brought against the Manager, is governed by this article and must be brought within 12 years of the refusal of the right of enjoyment. 3 O.C. 351 (B).

(5) Suit for annuity:—

A ——— payable out of the income of immoveable property, the same having been decided upon by arbitration in the course of a suit is governed by this article. 16 A. 189=14 A.W.N. 19 (following 5 B. 68).

(6) Annual allowance from Government—Co-sharer's suit:—

A suit by a co-sharer to establish his title to a share in an annual allowance received by the defendant from Government is governed by this art. and not by art. 144, and will be in time if brought within twelve years from the date of refusal on demand. 15 B. 135.

(7) Suit to recover burial fees:—

In a ———, the right to which occurred whenever a corpse was brought for burial, the limitation of 12 years was held to run from the date of the first refusal of the enjoyment of the right. 24 W.R. 385.

(8) Right to recover additional rent:—

A ——— for increased area is a recurring right. 6 C.W.N. 340.

(9) Plaintiff not liable to assessment:—

A right to obtain a declaration that plaintiff was not liable to be assessed to certain Municipal taxes is a “periodically recurring right.” 2 C.W. N. 689.

2.—Periodically recurring right.—(concluded).**(10) Suit between co-sharers of vatan:—**

A suit by one co-sharer against another for his share of an allowance attached to a *deshpande* vatan is governed by this article. 14 B. 286.

(11) Right to share in a pension:—

A suit by plaintiff to establish his right to share in a pension, brought against the drawer of the same, was *held* governed by this article or art. 127, assuming limitation was applicable to such a case. 9 A. 213 = 7 A.W. N. 22.

(12) Suit for *palla* or right to worship idol:—

A suit for a *palla*, or right to worship an idol in turn, is a periodically recurring right. 8 C. 807 = 10 C.L.R. 439; 4 C. 683.

But see 15 W.R. 29 = 6 B.L.R. 352.

(13) Right to receive maintenance:—

The——— is a constantly recurring right. 2 M.H.C. 36.

3.—‘When the plaintiff is.....right.’**(1) Necessity for demand and refusal:—**

For this article to bar a suit, there must not only be a non-user of the right for more than twelve years but there must also be a demand and refusal more than twelve years, before suit. 154 P.R. 1889.

(2) Abstention from enjoyment not abandonment:—

From a mere abstention from the enjoyment of a right established by a decree of Court, abandonment of the right cannot be inferred. 106 P.R. 1883.

(3) But limitation would begin to run only from the time when the plaintiff was first refused the enjoyment of the right. 146 P.R. 1882.**(4) Suit against Government for *mokasa* amals:—**

Assuming that Civil Courts can take cognizance of a—, such suit would be barred if there had been a total discontinuance of receipt of such allowances for over 12 years. 11 B. 222.

(5) Decree not specifying date of payment:—

Where a maintenance decree does not specify the exact date for payment of maintenance payable annually, the same would fall due on the day year from its date and thenceforward on the corresponding date year after year. 12 B. 65.

(6) Adverse possession of trustees—Effect:—

If one out of two branches of trustees is in adverse possession of the office and properties or emoluments attached thereto for more than the statutory period, the rights of the other branch would be extinguished by the operation of S. 28 of this Act. 18 M.L.J. 341.

3.—'When the Plaintiff is.....right.'—(concluded).

(7) No demand and refusal—No bar:—

If there is no demand and no refusal, a suit for arrears due under a periodically recurring right will not be barred under this article. 108 P.R. 1901.

(8) For other cases likely to fall under this head of this article:—

See No. 7, 24 W.R. 385 under Heading No. 2, *supra*.

No. 6, 15 B. 135 under Heading No. 2, *supra*.

No. 4; 3 O.C. 351, under Heading No. 2, *supra*.

No. 2, 10 C. 697 under Heading No. 1, *supra*.

132.—To enforce payment of money *Twelve years*. When the money charged upon immoveable property.⁽¹⁾ sued for becomes due.⁽²⁾

Explanation.—The allowance and fees respectively called *malikana* and *haqqas* ⁽³⁾ shall, for the purpose of this clause, be deemed to be money charged upon immoveable property.

(Old Acts.)

[Act IX of 1871; art. 132. Col. 1.—'For money charged upon immoveable property.'—Cols. 2 and 3, same as above.

Act XIV of 1859.—No provisions exactly corresponding to the above; but suits of this description would have fallen under s. 1, cl. 12 of that Act.]

(Notes)

Scope of article.

(1) Application of article.

The article applies only to suits to recover money charged on immoveable property *out of that property*; if personal remedy is asked for, this article will be inapplicable. 7 A. 502=12 I.A. 12 (P.C.); see on the same point 10 M. 100; 11 M. 56; 19 M. 100; 12 C. 389 (395); 15 C. 542; 24 C. 281; 14 B. 377; 22 B. 846; 3 A.W.N. 114; 3 A.W.N. 165 (*dissenting from* 6 B. 719); 5 B. 469; 12 C.L.R. 165 (169).

(2) Suit to enforce vendor's lien:—

A suit by a vendor of immoveable property to enforce his lien for unpaid purchase money is not governed by this art. but by art. 111. 7 M.L. J. 275=21 M. 141 & 10 M.L.J. 349.

(N.B.)—Compare this case with cases noted under art. 111 *supra*, under the heading 1—"To enforce his lien" at pp. 873 to 875 *supra*.

Scope of article.—(continued).**(9) Money charged on Immoveable property :—**

Where a plaintiff is suing for money which, as a matter of fact, is charged on immoveable property, the suit may be regarded as one to raise the money out of the property unless it is quite clear that the plaintiff only intended to ask for relief against the person of the defendant and not for relief against the property. 7 O.C. 108.

(4) Suit for haq-i-shahaharum :—

A———by a Zemindar is not governed by this article or art. 62 but by art. 120, whether the claim is based on custom or otherwise. 18 A. 430=16 A.W.N. 140; 1 A. 444 (F.B.) & 2 A. 358.

(5) Suit for Zemindari cesses :—

A suit by a Zemindar against *maufidars* for Zemindari duties or cesses is governed by this article. 2 A.W.N. 28.

(6) Suit for kattubadi :—

A———is governed by the three years' limitation, where no property is sought to be charged with liability but only a personal remedy is claimed. 19 M. 100 [following 7 A. 502, 12 C. 389, 10 M. 100 & 11 M. 66 & 59 and dissenting from 19 M. 103 (note)=5 M.L.J. 142, which decided that such a suit falls under this article and is governed by the twelve years' rule].

(7) Hypothecation of jagir income :—

A suit on a bond hypothecating certain jagir income was held governed by this article, since jagir income is a "benefit to arise out of land." 4 P.R. 1894.

(8) Debt charged on property bequeathed :—

A testator owing a sum of money to a certain person, devised some immoveables to the latter's son and asked him to repay the debt. The purchaser of the creditor's claim sued for recovery of the debt. Held, the debt was a charge on the property devised and the suit was governed by this article. 15 C. 66=14 I.A. 197 (P.G.)

(9) Arrears of maintenance charged on inheritance :—

A suit for———is governed by this article. 9 C. 945=18 C.L.R. 830=10 I.A. 45 (P.G.)

(10) Mortgage of trees :—

A suit based on a hypothecation bond charging standing trees is governed by this article, trees being regarded as immoveable property. 7 A.W.N. 59.

(11) Dakhbande Vatan—One co-sharer against another :—

A suit by one co-sharer, having previously obtained a decree declaratory of his title against another, for recovery of arrears, the whole having been

Scope of article.—(concluded).

received by the latter, is governed not by this article but by art. 62 as a suit for money had and received by the defendant for the plaintiff's use. 9 B. 111.

(12) Desai—Amin sukhdi allowance :—

A suit for his share of *amin sukhdi* allowance by one *desai* against another, who has received the whole allowance is governed not by this article but by art. 62. 8 B. 426.

(13) Landlord and tenant—Money-value of grain :—

A suit by a landlord against his tenant for arrears of money-value of fixed quantities of grain payable annually by the latter to the former is governed by art. 62 and not by this article. 8 B. 234.

(14) Co-sharer's suit for contribution :—

Where a co-sharer making payment of assessment has no charge on the defendant's share of the estate, either art. 61 or 99 will apply and not this article—Per Bhashyam Ayyangar, J. in 26 M. 686 = 18 M.L.J. 83.

1.—To enforce payment of money charged upon immoveable property.

(General.)

(1) Suit to enforce charge :—

A suit to enforce a charge against immoveable property is one to recover an interest in immoveable property and is governed by the twelve years' limitation. 19 C. 336 (340).

(2) Attachment of Hindu son's share :—

The—during the father's life-time creates a charge thereon and a suit, by the attaching creditor, after the father's death, to enforce such charge against the son's share is governed by this article. 8 M.L.J. 64.

(3) Suit by creditor against widow's estate :—

A creditor seeking to enforce a charge on the inheritance of a widow alienated by her is bound to show the nature of the transaction and that, in advancing his money, he gave credit, on reasonable grounds, to an assertion that the money was wanted for one of the recognised necessities, 6 C. 843 (P.G.) = 8 C.L.R. 361 = 8 I.A. 8.

(4) Gratuitous payment :—

A suit by a person (who paid the mortgage amount on behalf of the mortgagor) to recover the interest on the said money was barred, since the suit was brought 12 years after payment and he had not obtained a transfer of the mortgage, but only acquired an equitable right. 6 C.P.L.R. 64.

(5) Charge not amounting to a mortgage :—

(a) This article applies to a suit to enforce charges upon immoveable property, where such charges are created by a transaction not amounting to a mortgage. 151 P.R. 1888 (F.B.)

1.—*To enforce payment of money &c.*—(continued).

General.—(concluded).

(N.B.)—This decision has been overruled by 119 P.R. 1890. (F.B.)

- (b) This article applies to suits for sale by a creditor having a right to realise a charge not amounting to a mortgage. 10 B. 519.

(6) *Hypothecation-bond* :—

A charge created by a hypothecation bond is "an interest in the party in whose favour that charge is made." 9 W.R. 170 at p. 173 (F.B.); 19 C. 886 at p. 340 & 6 B.H.C. 184—*cited in Mitra's Limitation at p. 999.*

(7) *Money charged on rents and profits* :—

A suit for——is one governed by this article, rents and profits being immoveable property. 7 A. 120=4 A.W.N. 283.

(8) *Charge on moveable property* :—

A suit to enforce a——is governed by article 120. 22 C. 21.

(9) *"Charge" in S. 40 of the C.P. Tenancy Act* :—

The "charge" referred to in S. 40 of the C.P. Tenancy Act is not such a charge as is defined by §. 100 of the Transfer of Property Act. 10 C.P.L.R. 48.

A.—Cases in which a charge is acquired.

(1) *Instrument in general terms* :—

An——, purporting to charge all the immoveable properties of the obligor without specification, does create a charge within the meaning of this article, and a suit to enforce such a charge is governed by this article. 9 A. 158=7 A.W.N. 15 (*referring to 7 A. 502=12 I.A. 12 (P.C.), and 3 A. 276.*)

(2) *Suit for contribution* :—

A suit by the owner of two villages, sold under a decree on a mortgage, claiming contribution proportionately against the owners of the other properties included in the mortgage is governed by this article and not by art. 99 or 120. 12 A. 110=10 A.W.N. 31 (*referring to 6 C. 549 and 4 A. 55.*)

(3) *Suit for annuity* :—

A——charged on the income of immoveable property is governed by this article. 18 A. 189.

(4) *Suit by vendor for unpaid purchase-money* :—

(a) A——to enforce his charge against the property sold, under s. 55 (4) of the Transfer of Property Act, is governed by this article. 21 A. 454; 18 B. 48; 22 B. 846 [*following 12 I.A. 12=7 A. 502 (P.C.)*]. If a personal remedy is asked for, this article will not apply. *Ibid.* Cf. 7 M.L.J. 275 & 10 M.L.J. 849, No. 2, under Heading "*Scope of article,*" *supra*.

1.—'To enforce payment of money due'—(continued).

A.—Cases in which a charge is acquired.—(continued).

- (b) An unpaid vendor has a charge, on the property sold, in execution of his decree. He is also entitled to a personal remedy. 2 A.L.J. 379 = A.W. N. (1905), 144—*Per Banerji, J. Contra, per Richards, J.*—The owner of a charge as distinguished from a mortgage is not entitled to a personal decree under s. 90 of the Transfer of Property Act.—*Ibid.*

(5) Mortgagor paying off a decree for sale:—

A suit for contribution, by a person having a mortgagor's interest in certain property and paying off a decree for sale as against the property, brought against his co-mortgagors, is governed by this article, even though the plaintiff-mortgagee has not obtained possession from the mortgagor. 26 A. 227 (referring to 11 M. 416 and 4 O.C. 278.)

(6) Co-mortgagor paying entire mortgage-amount:—

- (a) A——and redeeming the property, has a charge on the property redeemed as against the other mortgagors bound to recoup him (the redeeming-co-mortgagor). A suit by the other co-mortgagors, to redeem their shares on payment of their *quota* of the amount paid towards redemption, is not governed by art. 148. 26 B. 500.
- (b) A co-mortgagor, redeeming the whole of the mortgaged property, acquires a charge on the other co-mortgagors' shares of the property mortgaged for the proportionate part of the amount paid for redemption under S. 95 of the Transfer of Property Act. 11 M. 416 (418).

(7) Mortgagee of putnee taluk paying money to prevent sale:—

Where a mortgagee of a *putni* taluk pays money to prevent the sale of such taluk for arrears of Zemindari rent, the payment is not a voluntary payment and he will be entitled to a charge on the taluk therefor. 4 C. 539 = 6 C.L.R. 28.

(8) Suit for money paid for Government revenue:—

- (a) Where, in a suit for recovery of Government revenue paid to save the whole estate from sale, the plaintiff asks to have the amount so paid made a charge on the portion for which he paid it, such suit would be governed by this art., and not by art. 99. 6 C. 549 = 8 C.L.R. 209.
- (b) A part-owner, paying the whole revenue due on land for saving his own interest and seeking contribution from other co-owners, will be entitled to a charge on the shares of the other co-owners. 11 M. 452; 22 W.R. 411; 4 C. 539 = 6 C.L.R. 28.
- (c) A co-sharer paying the entire Government revenue has a charge on the land for the amount so paid to the extent to which he is entitled to a contribution from the other co-sharers. This article applies to a suit for contribution in such a case. 15 M.L.J. 219 (following 26 M. 686 and referring to 2 A. 241) (P.C.) Cf. 26 M. 686,

1.—'To enforce payment of money &c.'—(continued).

A.—Cases in which a charge is acquired.—(concluded).

(9) Suit by mortgagee against surplus sale-proceeds :—

- (a) A—to recover his mortgage-money charged on surplus sale-proceeds, the mortgaged property having been sold free from incumbrances for arrears of (Government revenue, is governed by this article or art. 120. 27 C. 180.
- (b) A claim by a mortgagee for recovery of the mortgage-debt out of sale-proceeds of the mortgaged property sold by Collector for arrears of Government revenue, is governed by this article and not by art. 120. 31 C. 745.

(10) Instalment-decree :—

A suit on an instalment-decree (obtained on a compromise charging immoveable property for payment of the decree-debt) to recover the amount of an instalment by charging the property, held governed by the twelve years' rule. 7 M. 328.

For other cases in which a charge is acquired, see cases under Heading, 'B' at p. 854, under art. 99, *supra*.

B.—Cases in which a charge is *not* acquired.

(1) Mortgagee paying arrears of revenue :—

Where the mortgagee, who paid the arrears of revenue in order to save the property mortgaged from revenue-sale, sued to recover the amount so paid without asking for any relief as against the property, the decree obtained in the suit could not be executed as against the property. 8 W.R. 17 (P.C.)

(2) Suit on bond, neither a mortgage nor a charge :—

A bond, which provides for the realization by the creditor of the principal and interest out of the debtor's moveable and immoveable property without any specification of property, creates neither a mortgage nor a charge. A suit on such a bond will be governed by art. 66 or art. 116, according as the bond is unregistered or registered. 14 A. 162.

(3) Payment of revenue creating no charge :—

- (a) Payment by a co-sharer, having an interest in an estate, of the whole of the Government-revenue due on the estate, thus saving his share from sale, does not acquire a charge, as against the remaining co-sharers, on the latter's shares in the estate. 14 A. 273 (approving 14 C. 809).
- (b) A co-sharer, who has paid the whole revenue and thus saved the estate, does not, by reason of such payment, acquire a charge on the share of the defaulting co-sharer. A suit for contribution by him, would be governed by article 99 and not by this article. 14 C. 809 (F.B.) (overruling 14 B.L.R. 155, explaining and distinguishing 11 M.L.A. 241 at p. 288, and approving 8 C. 402.)

I.—‘To enforce payment of money &c.’—(continued).

B.—Cases in which a charge is not acquired.—(concluded).

- (c) A co-sharer paying Government revenue in order to save his as well as his co-sharer's property from sale acquires no charge on the latter's property. A suit to recover such money is governed by article 99 and not by this article. 15 C. 542 [following 14 C. 809, (F.B.).]
- (d) A co-sharer paying the decree-amount and the auction-purchaser's fees and getting a sale set aside under S. 174 of the Bengal Tenancy Act, does not acquire a charge on the shares of the defaulting co-tenants. 22 C. 800 [following 14 C. 809.]

(4) Charge not created by simple loans :—

Where, after the execution of a mortgage-deed, simple bonds are executed for simple loans, providing for payment before the mortgage-debt is discharged and stating that no redemption would be allowed except on payment of the simple loans, no charge would be created on the mortgaged lands for the amount of the simple loans, although redemption might be prevented until the payment of the simple loans. 9 B. 233 & *Ibid*, 236 (Note).

Cf. 8 O.C. 132, & 27 A. 178 under Ss. 60 & 61, Transfer of Property Act, in the ‘Current Index.’

(5) Suit for assessment paid by co-owner :—

A———of property from other co-owners, when the payment is not in the nature of salvage payment so as to make it a charge, according to justice, equity and good conscience upon the shares of other co-owners, is not governed by this article. 11 B. 313.

(6) Voluntary payment :—

Payment, by a person, of assessment due by another in order to save from revenue-sale his own land, does not create a charge on land for which payment is made. Suit to recover such sum is not governed by this article. 26 B. 437.

(7) Invalid mortgage—No charge :—

A mortgage which is invalid for want of attestation does not become a charge. 9 C.W.N. 697. *(See ‘Current Index,’ Part ii, Col. 622).

(8) Payment of rent to Mittadar by co-tenant :—

Where one of two co-tenants paid the whole of the rent due to a Mittadar and sued the other for contribution *held*, the former had no charge on the property and the suit was governed by art. 99 and not by this article, 15 M. 258.

(9) Agreement to execute a mortgage :—

A mere———of immoveable property does not create a charge on immoveable property. 28 M. 54.

For other cases in which a charge is not acquired, see cases under Heading ‘A’ under S. 99, *supra*, at pp. 853 & 854.

1.—‘To enforce payment of money &c.’—(continued).

C.—Suits on mortgages.

(NOTE).—There is a difference of opinion as to whether suits for money based on mortgages or hypothecation bonds are governed by this article or by art. 147, *post*. So, the decisions (relating to Mortgages) of the highest judicial tribunals of the different Provinces in India are arranged below, under separate heads, in their chronological order.

(Allahabad Cases).

(1) Suit to enforce personal liability :—

A suit by a mortgagee to recover mortgage-money as against the person of the debtor is not governed by this article. 5 A. 461 [*dissenting from* 6 B. 719 (F.B.)].

(2) Suit by mortgagees for sale :—

(a) A——based upon a hypothecation-bond mortgaging immoveable property is governed by art. 147 and not by this article. 6 A. 551 (F.B.)

(b) A——of the property mortgaged in execution of a decree obtained by the former is governed by art. 147 and not by this article. 3 A.W.N. 200; 4 A.W.N. 188.

(c) A——based upon a bond providing that the debtor had pledged his share in a Zemindari to secure his creditors and that he would not transfer or alienate such share until the amount borrowed was paid back in full, held governed by art. 147 and not by this article. 14 A.W.N. 57 (*dissenting from* 14 C. 780 and *approving* 13 B. 90 (F.B.) and 13 A. 28).

(3) Suit by usufructuary mortgagees for money :—

A——by sale of the mortgaged property, the mortgagor having defaulted to put the former in possession, is governed by this article. 3 A.W.N. 216 [*distinguishing*, A.W.N. (1882) p. 88.]

(4) Mortgage and charge, difference between :—

Where the obligors state in a bond that they have mortgaged certain property as security for the loan and undertake not to alienate the property by sale or mortgage so long as the principal and interest remain unpaid, the transaction amounts to a simple mortgage and not a charge. 7 A. 258 (F.B.) PETHERAM, C.J., *dissenting* :

Per PETHERAM, C.J.,—Such a transaction amounts merely to a ‘charge.’ *Ibid*.

(Bombay Cases).

(1) Suit by mortgagees for money-decree :—

This article applies to a suit by a mortgagee to obtain a mere money-decree. 6 B. 719 (F.B.).

(N.B.)—This case has now been virtually overruled by the decision of the Privy Council in 7 A. 502. *Vide* No. 1, under the heading “Scope of article,” *supra*.

1.—To enforce payment of money: *etc.*—(continued).

C.—Suits on mortgages.—(continued).

(Bombay Cases).—(concluded).

(2) Suit for money due on mortgage:—

Where a bond stated that property mentioned therein was mortgaged as security for the loan and that, if the principal and interest were not paid within the time fixed, the plaintiff was to take up management of the property, art. 147 and not this art. governs a suit to recover the amount due thereon. 18 B. 90 (F.B.)

(3) Suit to enforce mortgage lien by sale:—

A——of the mortgaged property is governed by art. 147 and not by this article, if the deed of mortgage contains a stipulation to the effect that the mortgaged property might be sold in case of default. 14 B. 577.

(4) Mortgage bonds:—

Bonds, by which the property mentioned therein is declared to be a security for the loan, are treated, in the Bombay Presidency, as mortgages and suits thereon are governed by art. 147 and not by this article. 15 B. 183.

(5) Security pledges:—

Security mortgages, such as *nazar gahan* or *taran gahan* mortgages are mortgages proper, and are governed by art. 147 and not by this article: 22 B. 408 (*dissenting from* 10 B. 519, 10 M. 500, & 14 C. 730; and *following* 15 B. 183).

(Calcutta Cases).

(1) Suit to enforce mortgage lien:—

A suit to enforce a mortgage lien against the mortgaged property in the hands of an alienee from the mortgagor would be governed by art. 147 and not by this article. 12 C. 111.

(N.B.)—This case has been overruled by 14 C. 730 (F.B.)—See No. 3 *infra*.

(2) Suit on bond neither mortgage nor charge:—

Where a document does not amount to a mortgage nor creates a charge under S. 100 of the Transfer of Property Act, it would be governed by the three years' limitation. 14 C. 687.

(3) Suit on mortgage-deed:—

A suit on a mortgage-bond to enforce payment by sale of premises hypothecated, is governed by this article and not by art 147. 14 C. 730 (F.B.)

(N.B.)—This case has overruled 12 C. 111 (No. 1 *supra*).

(4) Debt not effectively charged on land:—

Where a debt is not effectively charged on immoveable property this art. would not apply. 20 C. 79 = 19 I.A. 234 (P.C.)

(5) Mortgage deed fixing no date:—

Where a mortgage-deed fixed no time for payment, a suit on the bond brought more than twelve years after the date of the deed and also more than

1.—'To enforce payment of money' &c.—(continued).

C.—Suits on mortgages.—(continued).

(Calcutta Cases).—(concluded.)

twelve years after the date of the last payment to the mortgages held barred. 20 C. 269.

(6) Instalment hypothecation bond :—

A suit on an——providing for realization of the entire amount on default in payment of any one instalment, is governed by this article. 24 C. 281 = 1 C.W.N. 229.

(7) Mortgage-bond by Mitakshara father—Suit against son.

- (a) A suit to enforce a mortgage-bond, executed by a father in a *mitakshara* family, against his sons (the mortgage having been effected mainly to discharge an antecedent debt and not being shown to have been incurred for any immoral or illegal purpose) is governed by this article. 2 C.W.N. 608.
- (b) Where, in the case of a mortgage-deed executed by a Hindu father in a joint Hindu family governed by the *Mitakshara*, it is not proved that the money was required to pay off an antecedent debt or that it was incurred for immoral or illegal purposes, it cannot bind the son as a mortgage after the father's death; the mortgagee would be entitled to a money-decree against the son, only if the suit is brought within six years from the date of the mortgage deed. 27 C. 762; 5 C. 855 (F.B.) & 20 C. 328.

(Madras Cases.)

(1) Suit on hypothecation bond :—

The holder of a hypothecation bond, executed before the 1st July, 1882, the date on which the Transfer of Property Act came into force, had only a charge on the hypothecated property, and could not ask for a sale of the property; whereas, the holder of a similar bond, executed after the Transfer of Property Act came into force, can pray for sale and bring his suit within the period prescribed by art. 147—*Per* MUTTUSAMI AYYER, J. in 9 M. 218 and 10 M. 509 (511), "This distinction, based on the date of the hypothecation bond, is unimportant"—*Per* SHEPPARD, J. 21 M. 326 (at p. 336) (F.B.)

(2) Suit by mortgagee by conditional sale :—

A——for foreclosure or sale is governed by art. 147 and not by this article, even though the mortgagor dispossessed the mortgagee and the latter's suit for foreclosure or sale is brought more than twelve years from the date of dispossession. 16 M. 64.

(3) Remedy of usufructuary mortgagee :—

A usufructuary mortgagee, as such, cannot sue either for foreclosure or for sale. 12 M. 109 (111).

(4) Usufructuary mortgage containing personal covenant :—

A suit for recovery of money due under a usufructuary mortgage, containing a personal covenant to pay, by sale of the mortgaged property, is governed

1.—‘To enforce payment of money’ &c.—(continued).

C.—Suits on mortgages.—(continued).

(Madras Cases.)—(concluded).

by article 147 and not by this article. 19 M. 411=6 M.L.J. 210
[*following* 17 M. 181 (F.B.)]

(5) Suit by usufructuary mortgagee—Failure to secure possession :—

- (a) A suit by a usufructuary mortgagee for the mortgage-money on the ground of the mortgagor's failure to secure possession would be governed either by art. 116 or art. 120, the liability to secure possession being one imposed by S. 68 of the Transfer of Property Act and there being no other article applicable to such a suit. Such suit is not governed by this article. 21 M. 242=8 M.L.J. 81.
- (b) Where a usufructuary mortgage-deed contains no covenant to pay and the mortgagor fails to deliver or secure possession of the property to the mortgagee, the latter is not entitled to claim, in a suit for money due under the mortgage, an order for sale of such property. 21 M. 476 (F.B.)

(6) Suit by usufructuary mortgagee for sale :—

- (a) A ——— to recover the mortgage-money by sale of the mortgaged property, possession thereof not having been given to him, is not maintainable nor is such a suit governed by this article. 8 M.L.J. 151.
- (b) Where, in the case of a usufructuary mortgage-deed, containing a covenant to pay, the mortgagee, not having obtained possession, brings a suit for the mortgage-money by sale of the property mortgaged, the suit would be governed by this article and not by art. 147. 21 M. 326 (F.B.)

But see 25 M. 220 (F.B.), which holds that such a suit would be governed by art. 147.

(7) Mortgagee's suit for foreclosure or sale :—

A suit by a mortgagee, whether it be for foreclosure or sale, and in the case of suits for foreclosure, whether the relief sought is foreclosure alone or is coupled with a prayer in the alternative for sale in lieu of a decree for foreclosure, is governed by art. 147 and not by this article. 25 M. 220 (F.B.), *dissenting from* 21 M. 326 (F.B.), No. 6 (b), *supra*.

(8) Remedy of person having two mortgages :—

A person having two mortgages on the same property cannot maintain a suit for sale on the basis of the earlier mortgage alone, such sale being subject to the subsequent mortgage in his favour. 25 M. 158.

(9) Mortgage deed containing covenant to pay :—

Where a mortgage-deed contains an express covenant to pay, the mortgage will not be construed as a purely usufructuary mortgage. 26 M. 662.

(10) Hypothecation bond :—

A suit by the mortgagee upon a simple mortgage-bond is governed by this art. and not by art. 147. 8 M.L.J. 217.

1.—'To enforce payment of money' &c.—(continued).

C.—Suits on mortgages.—(continued).

(Punjab Cases.)

(1) Suit for personal decree against mortgagor:—

This article has no application to a suit on a mortgage, where the relief asked for is only a decree for mortgage-money against the mortgagor personally. 90 P.R. 1881, (SMYTH, J. *dissenting*), 55 P.R. 1884 (F.B.)

(2) Suit by mortgagee to enforce payment against mortgaged property:—

Where, in a suit for money due under a mortgage-deed, which was a simple mortgage with delivery of possession to the mortgagee, the plaintiff sought enforcement of the deed against the mortgaged property, the suit was governed by art. 147 and not by this article, as it was in effect, one for sale. 19 P.R. 1885.

(3) Suit for sale on simple mortgage:—

A suit to recover the principal and interest due upon a deed of simple mortgage by sale of the mortgaged property is governed by this article and not by art. 147. 112 P.R. 1890 (F.B.) (*following* 14 C. 780 and *overruling* 151 P.R. 1888.)

(4) Property hypothecated as security:—

A suit for recovery of money due by a guardian out of property hypothecated by him as security for the due performance of his duties as guardian must be instituted under this article, within twelve years of the termination of his office as guardian. 33 P.R. 1897.

(5) Suit by mortgagee for the mortgage-debt:—

A suit brought, by a mortgagee against the representatives of the mortgagor, for the mortgage-debt, on the security of the mortgaged property, more than twelve years after execution of the deed, falls within this art. and not 147. 1 P.L.R. p. 48.

(6) Suit for sale based on a mortgage-deed:—

A suit on a mortgage stipulating to pay the principal and interest in instalments and that, in the event of failure to pay any instalment, the mortgagee should be put in possession, for recovery of the principal and interest by sale of the mortgaged property was held governed by this art. and not by art. 147. 1 P.L.R. p. 178.

(7) Mortgagee's failure to secure possession:—

Where, in the case of a mortgage deed providing for payment in instalments and providing also that in case of default in payment of any instalment, the mortgagee might enter into possession, the mortgagee failed to secure possession, on default occurring, and brought a suit, more than twelve years after default, for recovering the mortgage-money, the suit was held barred by this article. 23 P.R. 1900.

1.—To enforce payment of money. &c.—(continued).

C.—Suits on mortgages.—(concluded).

(Central Provinces Cases.)

1) Suit by mortgagee for sale:—

A suit by a simple mortgagee to recover the mortgage-money by selling the property is governed by art. 147 and not by this article, as he has a right to sue for sale under Act IV of 1882. 2 C.P.L.R. 57.

(2) Suit for foreclosure or sale:—

The power of sale contained in s. 58 (b) of the Transfer of Property Act is not necessarily a power to sell without the intervention of the Court. Words of hypothecation import the right of the mortgagee to bring the property to sale for satisfaction of his claim. A suit, therefore, based on a mortgage for foreclosure or, in the alternative, for sale, is governed by art. 147 and not by this article. 12 C.P.L.R. 26.

(Oudh Case.)

Suit on simple mortgage:

Art. 147 and not this article governs a suit by a simple mortgagee for sale of the mortgaged property. 3 O.C. 156.

(Upper Burma Case.)

Destruction of mortgaged property—Suit for money:—

Where the subject-matter of a usufructuary mortgage, containing no covenant to pay, becomes wholly or partly destroyed, a suit by the mortgagee to recover the mortgage-money will be governed by art. 130 and not by this article or by art. 57. U.B.R. 518 (1897-1901.)

D.—Interest on Mortgages.

(1) Interest treated as charge on mortgaged estate:—

(a) Where a mortgage-deed made the principal and interest due under it a charge upon the mortgaged land and more than twelve years' interest became due under the bond, in a suit for redemption, the mortgagor could not avail himself of this article, so as to obtain redemption on payment of the principal and so much of the interest only as accrued during the twelve years immediately before the suit. 147 P.R. 1390, (approving 8 P.R. 1890 and overruling 57 P.R. 1888).

(b) In suits to recover the principal and interest of a loan secured by mortgage of immoveable property, interest for twelve years is recoverable by virtue of this art. 6 M. 417.

(c) Where a mortgage-bond stipulated that interest, at a certain rate, should be paid annually and there were no words limiting this liability to the time fixed for payment of the principal and where interest was paid for several years after the due date, held, the interest was a charge on the property. 22 B. 107.

1.—'To enforce payment of money' &c.—(continued).

D.—Interest on Mortgages.—(concluded).

(2) Up to what date interest allowable :—

- (a) Interest is allowable on a mortgage generally, at the stipulated rate, up to date of realisation. 30 C. 953; 26 C. 39=25 I.A. 179 (P.C.); 23 A. 181=28 I.A. 35 (P.C.)

Compare 29 C. 43 & 31 C. 138 which decide that contract rate of interest should be allowed up to the date fixed by the decree for the repayment of the money due and, after that date, interest is allowable at such reasonable rate as the Court might fix.

- (b) In the case of a decree based on a mortgage, interest may be allowed at the contract rate (where there is a contract for interest up to date of payment) up to the date fixed in the decree for redemption and at the Court rate after that date and up to date of payment. 6 C.W.N. 769.

(3) Interest in a redemption suit :—

In a redemption suit, the mortgagee is entitled to interest from the date of the bond up to date of decree and not for six years only. 14 B. 113.

(4) Rule of damduput :—

- (a) The ——— is inapplicable to mortgages governed by the Transfer of Property Act. 26 M. 662.

- (b) When the — has once been applied in any account directed to be taken by the Court in a mortgage suit, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest, not only for the period of six months allowed for redemption, but also subsequently without limitation of time. 21 C. 840.

But when the total amount found due, on accounts taken, is less than double the principal, the mortgagee may claim further interest at 6 p. c. until satisfaction. 33 C. 899.

E.—Post diem Interest whether a charge or not.

(NOTE).—The following cases should be read with cases under the heading "E.—Post diem Interest at p. 891, *supra*, and more especially with the decision of the Privy Council in 19 A. 39 (P.C.)=1 C.W.N. 52. Those cases have been omitted here to avoid repetition and economise space.

- (1) — is claimable "as damages" only for six years prior to suit, where there is no stipulation in the deed for payment of interest at the due date. Such amount will be a charge on the mortgaged property. 24 C. 699 (F.B.).
 • Compare 21 C. 374.
- (2) Where there is no contract to pay the same after the due date—is not claimable as interest but only by way of damages. 17 A. 511 (P.C.)=22 I.A. 199.
- (3) Where there is no stipulation in a deed of conditional sale to pay interest after the day fixed for the repayment of principal and interest, a suit for interest

1.—‘To enforce payment of money’ &c.—(concluded).

E.—Post diem interest whether a charge or not.—(concluded.)

after due date, being one for compensation, must be brought within six years from the date of breach. 19 C. 19.

- (4)——cannot form a charge on immovable property when the deed does not contain a provision for payment of the same after the due date. 13 A. 390.
But see 19 A. 39 (P.C.)
- (5) A suit to recover——due on a hypothecation bond payable under an implied contract, though not specifically provided for by the bond, is governed by this article. 4 M.L.J. 260.
- (6) Where there is no provision for payment of *post-diem* interest, interest may be awarded under the Interest Act, 1839, and interest so awarded would constitute a charge on the mortgaged premises. 18 M. 248 = 4 M.L.J. 265; 5 M.L.J. 154.
- (7) Where a mortgage-deed payable by instalments contains no covenant for payment of *post-diem* interest, the claim for such interest, being in the nature of compensation for breach of contract, must be enforced within six years from the date of the breach. 8 C.P.L.R. 95.

F.—Equitable mortgages by deposit of title-deeds.

- (1) The remedy of an equitable mortgagee by deposit of title-deeds is not to a conveyance of the legal estate but to a sale of the mortgaged property. 13 C. 322.
- (2) A suit to enforce payment of debt secured by mortgage created by deposit of title-deeds is governed by this article and not by art. 147. L.B.R. (1872-92), 555.
- (3) A suit on an equitable mortgage by deposit of title-deeds either for foreclosure or sale is governed by art. 147 and not by this article. 14 B. 269.
- (4) An equitable mortgage by deposit of title deeds in respect of property situated partly within and partly without Calcutta, is valid under S. 59 of the Transfer of Property Act. The appropriate remedy, in such a case, is a decree for sale. 1 C.W.N. 225.
- (5) A suit by a creditor for recovering money borrowed of him on deposit of title-deeds by proceeding against the property covered by the title-deeds, was held to be a claim relating to land and was governed by S. 1, cl. 12 of Act XIV of 1859. 10 W.R. 56.

2.—‘When the money sued for becomes due.’

(1) Hypothecation-bond payable on demand:—

In the case of a hypothecation-bond payable on a certain date and providing that, in case interest is not paid at the stipulated time, the amount would be payable earlier “on demand” by the obligee, the cause of action does not arise unless and until a demand is made earlier by the obligee. In such a case, the words ‘on demand’ import a condition and

2.—“When the money sued for becomes due.”—(continued).

so a demand is essential to give rise to the cause of action and the words “on demand” are not mere technical words. 22 M. 20 = 8 M. L.J. 187.

- (2) But a suit to recover principal and interest due on a hypothecation-bond payable on demand, a demand is not necessary to give rise to the cause of action. The suit will be governed by this article and time will begin to run from the date of the bond. 21 M. 189 = 7 M.L.J. 815.

(N.B.)—This was a case of a hypothecation-bond executed before the Transfer of Property Act.

- (3) In the case of a hypothecation-bond stipulating for payment of principal on a certain date and providing that, on default in payment of interest payable monthly, the principal and interest should become payable on demand, the period of limitation begins to run from the date of the first default and not from the date of demand. 20 M. 245 = 7 M.L.J. 222.

(N.B.)—This was also a bond executed before the Transfer of Property Act.

- (4) As to the distinction to be drawn between cases of mortgages executed before and after Transfer of Property Act, see 21 M. at p. 336.

(5) Instalment bond :

A suit to enforce payment of money charged on immoveable property under a bond providing for payment in instalments, with a condition that, on default in paying any one instalment, the whole shall become immediately due, should be brought within twelve years from the first default. 1 A.W.N. 21.

(6) Date of cause of action :—

Mortgage-bond dated 14th June, 1876. Date for repayment, “month of Jeyth, 1289 Faali, being a period of six years.” The last day of Jeyth 1289 = 1st June, 1882. The period of six years from date of bond ended on 14th June, 1882. Suit instituted 12th June, 1894. Held, money became due on 14th June, 1882 and suit was in time. 24 C. 382.

(7) Cause of action for personal remedy :—

The cause of action on a hypothecation-bond for enforcing the personal remedy of the mortgagor arises simultaneously with that for enforcing the remedy by sale of the property. 20 A. 512.

(8) Suit under S. 68, Transfer of Property Act :—

Money was advanced on a usufructuary mortgage in January, 1873. Another sum advanced on the same security in July, 1873. The land secured was washed away in 1892. Suit in 1894 for money due on both the deeds under S. 68 of the Transfer of Property Act. Held, the suit, so far as it was based on the second bond not barred by limitation, the intention of the parties being that the amount of the second bond was to be added to that of the first and the cause of action having arisen when the land was washed away. 25 C. 450.

3.—‘*Malikhana and haqqas.*’

(1) *Malikhana right, definition of:—*

A——is the right to receive from the Government a sum of money, which represents the *malik's* share of the profits of a revenue-paying estate. Such a right is similar to a right to receive rents and may form the subject of a gift under the Mahomedan Law. 10 C. 1112 (1125).

(2) *Suit to recover arrears of malikhana etc.:—*

(a) A——and a suit to establish title to receive such right are based on the same cause of action so that if the suit for the establishment of title is barred, the right to recover the arrears would be equally barred, notwithstanding the fact that the whole or some portion of the arrears is within the period of limitation. 6 B.H.C. A.C. 56 & 9 B.H.C. 260.

(b) Where the title to receive certain allowance had already been decided, a suit to recover arrears of allowance for twelve years will lie, even though the plaintiff had not received the allowance for more than twelve years previous to the date of suit. Prior to the Act IX of 1871, only six years arrears could be recovered. 5 B. 68.

(c) *Malikhana*, being an annual recurring charge on immoveable property, may be sued for within twelve years from the date of its becoming due. 5 C. 921 6 C.L.R. 133.

(d) A suit to recover *malikhana* due as a charge upon land belonging jointly to the defendants would not be barred if the plaintiff had received it within twelve years of suit, even though the plaintiff's claim as against one of the defendants may be barred. 22 W.R. 551.

(3) *Recusant proprietor claiming malikhana:—*

A recusant proprietor claiming *malikhana*, if out of possession for more than twelve years, would be deprived of all his remedy as well as title to his interest in the property. 19 W.R. 465.

(4) *Non-payment for more than twelve years:—*

(a) The fact that *malikhana* was not paid within twelve years before suit did not bar a suit to enforce the payment thereof, where there was an arrangement to set it off against the rent payable and where the right to such *malikhana* was not alienated. 21 W.R. 88.

(b) The right to recover *malikhana* ceased to be enforceable by suit, when it was left as an unclaimed deposit in the Collector's hands for 12 years. 19 W.R. 94; 22 W. R. 531; 4 B.L.R.A.C. 29 + 10 W.R. 302.

(5) *Suit for arrears under Act XIV of 1859:—*

(a) A suit for arrears of *malikhana* might be sued for within six years, under Act XIV of 1859. 6 W.R. 151.

(b) *Malikhana* being an interest in immoveable property, was governed by s. 1, cl. 12 of Act XIV of 1859. 9 W.R. 102; 19 W.R. 94; 12 W.R. 498.

(c) A suit for *malikhana* was governed by s. 1, cl. 13, of Act XIV of 1859. 7 W.R. 336.

3.—' *Malikhana and haqq.* '—(concluded).

(6) **Issue in a suit for *malikhana* :—**

A suit for *malikhana* substantially raises the question of the proprietary right to the estate in respect of which the *malikhana* is claimed. 10 C. 697.

(7) **Suit for *haqq* :—**

(a) This article applies to suit by a "*hakdar*" against the person originally liable for payment of the "*hak*". 7 B. 191.

(b) This section is inapplicable to suits by *haqdars* and others against third parties, who have actually received the amounts from persons liable to pay the same, the article being applicable only to suits against the persons originally liable to make the payment. Suits of the former description fall under art. 62 *supra*, as for money received by defendant for plaintiff's use. See Nos., 12, 14, 15, 16, 17, at p. 784, *supra*, and 8 B. 496, & 5 C. 931.

(8) **Suit for *gharwara* dues :—**

A suit to recover the *gharwara* dues, payable by custom to zemindar or owner of land occupied by houses, is governed by art. 120 and not by this article, such dues not being *malikhana* or *haks*. 3 O.C. 203.

(9) **Suit *re* Government allowance :—**

Suit for arrears of plaintiff's share in a certain Government allowance received by the defendant is governed by art. 62 and not by this article. 22 B. 669 & 15 B. 135.

But a suit to establish the plaintiff's title to receive a share in the allowance is governed by art. 131. 15 B. 135.

(10) **Grant of revenue to mosque :—**

Where the right to the revenue on certain land granted to the trustees of a mosque was confirmed by the Government, the trustees of the mosque were entitled to recover 12 years' arrears of revenue either under this article or art. 131. 10 M. 115.

(Old Law.)

(1) **Act XIV of 1859, s. 1, cl. 10 :—**

Where an unregistered bond created a lien on immoveable property, a suit to recover the amount due under it was governed by———. 7 W.R. 354.

(2) **——— s. 1, cl. 12 :—**

(a) Where a bond hypothecated lands as security for due payment of the amount advanced, a suit to recover the sum due under the bond was governed by———. 8 W.R. 334.

(b) Suit on a hypothecation bond was a suit to recover an interest in immoveable property under cl. 12 of s. 1 of Act XIV of 1859. 7 W.R. 354; 9 W.R. 170 = B.L.R. Sup. Vol. 1879; 10 W.R. 56; 2 M.H.C. 54; 5 M.H. C.R. 364; 3 M.H.C. 92; 2 M.H.C. 307; 51; 1 N.W.P.H.C. 181; 25 W.R. (P.C.) 85 = 1 C. 163.

(Old Law).—(continued)

Such a suit was governed by the above clause where the relief claimed was against the person of the pledgor as well as against the property pledged. 7 B.L.R. 175 (Note) = 10 W.R. 379.

(c) But see 2 M.H.C.R. 109, where such suit was held governed by the three years' limitation provided by cl. 10, s. 1, Act XIV of 1859.

(d) A bond, whereby "the superstructure of a house exclusive of the land beneath" was hypothecated, created an interest in immoveable property within the terms of the Limitation Act. 8 M.H.C. 100.

(e) A suit to recover money due upon an unregistered but registrable mortgage-bond was governed by the twelve years' limitation provided by—, since the relief prayed for fairly implied the recovery of the debt by the enforcement of the mortgage-security. 5 M.H.C.R. 364.

(f) The twelve years' limitation provided by—, applied to a suit to recover money due under a registered mortgage-deed, where the relief sought was that payment of principal and interest might be enforced, both as a simple contract liability and as a debt secured by the collateral mortgage of immoveable property. 2 M.H.C.R. 307.

(g) Where a registered bond secured a lien on certain immoveable property for the due payment of a loan, a suit for the realization of the amount due under the bond by sale of the property secured was required to be brought within six years from the date on which the money became due. 6 W.R. 313. Compare 6 W.R. 132.

(h) A suit by a Mahomedan widow to enforce her lien on her husband's property in respect of the dower due to her, brought against his heirs, was governed by cl. 12, s. 1, Act XIV of 1859, if the suit was to enforce the lien on her husband's landed property; otherwise, cl. 16, s. 1 of the Act applied. 8 W.R. 51.

(3) ——— s. 1, cl. 13:—

Claims to *malikana* were governed by thirty years' limitation under——. 2 W.R. 163.

(4) *Haqq* not charged on land:—

A suit for the recovery of a ——— must be brought within six years from the date of the last payment. 6 Bom. F.C.A.C. 56.

(5) Grant of annuity charged on land:—

The ——— is in the nature of immoveable property, and a suit to enforce the benefit of the grant was governed by the twelve years' limitation provided for by cl. 12 of S. 1, Act XIV of 1859. 5 B. 323, on appeal, 6 B. 546 (F.B.)

See, also, 10 B. 149, where it was held that the right to receive an annuity payable out of the revenues of a temple was '*vidandh*' and must be regarded as immoveable property under the Hindu Law.

(Old Law).—(concluded).

(6) Interest of a *haqdar* :—

The interest of a *hakdar* was an "interest in immoveable property" within the meaning of Act XIV of 1859, and was governed by the twelve years' limitation proscribed by cl. 12, s. 1 of the Act. 21 W.R. 178 = 13 B. L.R. 254. 11 A. 34.

(7) Act IX of 1871—Suit for foreclosure :—

The period of limitation proscribed for a suit for foreclosure is either 12 years under this article or sixty years under art. 149. 3 B. 312.

133.—To recover moveable pro- *Twelve years.* The date of the purchase. property conveyed or bequeathed in trust,⁽¹⁾ deposited or pawned, and afterwards bought⁽²⁾ from the trustee, depositary or pawnee⁽³⁾ for a valuable consideration.⁽⁴⁾

134.—To recover possession of *Twelve years.* The date of the purchase. immoveable property conveyed or bequeathed in trust⁽¹⁾ or mortgaged, and afterwards purchased⁽²⁾ from the trustee or mortgagee⁽³⁾ for a valuable consideration.⁽⁴⁾

(Old Acts)

[Act IX of 1871, art. 133 :—To recover moveable property conveyed in trust, deposited or pawned and afterwards bought from the trustee, depositary or pawnee, in good faith and for value—Cols. 2 & 3, same as above. Art. 134 :—Col. 1—To recover possession of immoveable property conveyed in trust or mortgaged and afterwards purchased from the trustee or mortgagee in good faith and for value—Cols. 2 & 3, same as above.

Act XIV of 1859, S. 5.—In suits for the recovery from the purchaser or any person claiming under him of any property purchased bona-fide and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen

(Old Acts.)—(concluded).

at the date of the purchase. Provided that, in the case of purchase from a depositary, pawnee, or mortgagee, no such suit shall be maintained unless brought within the time limited by cl. 15, section 1].

(Notes)

Scope of articles.

(1) Old Act (1871) and present Act compared :—

(a) The words "*bona fide*," or rather "in good faith" which appeared in art. 134 of Act IX of 1871, were advisedly omitted in art. 134 of Act XV of 1877, to exclude the possible inference that absence of notice of the real owner's claim was necessary to enable a purchaser to avail himself of the article. 15 B. 583.

(b) Suit to recover possession of property purchased from a mortgagee was, under this art., required to be brought within twelve years from the date of purchase, if the purchase had been made in good faith; if not made in good faith, art. 148 governed, and the suit was required to be brought within sixty years. No such distinction is preserved in Act XV of 1877. All such suits must, under this art., be brought within twelve years. 9 B. 475.

(2) This article *may* be read with S. 10 of the Act, and confined to trusts for specific purposes.—*See* Mitra's Limitation at p. 1008 citing 9 B. 378 (at pp. 399 & 400).

(3) The article is intended to provide for a case, where the defendant's vendor purports to transfer full ownership when, in fact, he has only a mortgage-right to transfer. 21 M. 151.

(4) The article is not applicable to the case of a purchaser from a mortgagee of the interest of the mortgagee as mortgagee. 1 A.W.N. 122; 1 A.W.N. 75; 1 A.W.N. 169.

(5) Suit against sub-mortgages :—

Where a sub-mortgagee was merely a mortgagee of the mortgage-interest of the original mortgagee, and not of the entire property in the land, this art. cannot debar a suit for redemption against the sub-mortgagee as well. 18 B. 387.

(6) Purchaser with knowledge of limited interest of mortgagee etc. :—

A suit to recover properties from a purchaser from a mortgagee or trustee, who has actual knowledge that his vendor was in possession of the properties only as a mortgagee or trustee, is governed by art. 144 and not by article 134. 9 M.L.J. 98 (following 14 M.I.A. 1); 12 M. 816 & 19 B. 140.

(7) Sale of mortgagee's interest :—

The sale by a mortgagee of his interest in the mortgaged property does not come within this article, which protects only a person who, happening

Scope of articles.—(concluded).

to purchase from a mortgagee, purchases in the belief that the mortgagee had a right to convey, and was conveying, an absolute interest, and not merely the interest of a mortgagee. 9 A. 97=6 A.W.N. 303. Sale of mortgagee's interest falls under art. 148. 1 A.W.N. 75; *Ibid.* 122; *Ibid.* 169 & 9 A. 97=6 A.W.N. 308.

(8) Redemption against mortgagor who has redeemed:—

A suit, by the owner of a portion of a mortgaged estate, which has been redeemed by his co-mortgagor, to redeem such portion, brought against the co-mortgagee, is governed by article 148 and not by article 134. 6 A. W.N. 98; *Ibid.* 152; 11 A.W.N. 211.

(9) The article would not apply when the plaintiff seeks to establish, as against the alienance of a previous holder of a religious office, his own right as distinguished from the right of the endowment; but, if the plaintiff seeks to vindicate the right of the endowment, by asking for possession of land on behalf of the endowment, the article must apply. See 23 M. 271=27 I.A. 69 (P.C.) as explained in 27 B. 363 (369), cited in Mitra's Limitation at p. 1007.**I—'Conveyed or bequeathed in trust.'****(1) The words — include devices in trust, or are equivalent to the words "vested in trust" in s. 10 of this Act. 1 B. 269.****(2) The words "in trust for a specific purpose," in s. 10, apply to trusts of the nature and character mentioned in these articles. 4 C. 897=4 C.L.R. 193.****(3) Trust property vested under a gift:—**

A person in whom trust-property is vested by way of a gift from the *shebait*, is a person in whom the property is vested in trust for a specific purpose within the meaning of s. 10 of the Act. 81 C. 314.

(4) Effect of fiduciary relationship:—

When the defendant stands in a fiduciary relation to plaintiff, a trust is created in the latter's favor. 19 B. 352.

(5) Dedication under a sham deed:—

Suit to recover property, not being trust-property, but alleged to be endowed to a religious trust under a sham deed of trust, in the possession of defendant for more than twelve years as *bona fide* purchaser for valuable consideration, was barred. 15 B.L.R. 176 (Note)=20 W.R. 95 (P.C.)

(6) Effect of purchase in name of idol:—

Purchase of property in the name of an idol does not necessarily import a dedication to the idol. It may be a *benames* or sham transaction. 11 W.

* R. 18=2 B.L.R.A.C. 55.

(7) Applicability to will bequeathing trust-property:—

The article is inapplicable to a suit to recover possession of trust-property bequeathed in favour of the defendant by a deceased trustee. 56 P.R. 1894.

1.—‘Conveyed or bequeathed in trust.’—(concluded).

(8) Deposit with a banker :—

A——does not constitute a trust. 16 C. 25, (dissenting from the dictum of White, J., in 6 C.L.R. 470).

2.—‘Afterwards bought’—‘afterwards purchased.’

(1) Meaning of words :—

The words “purchased” and “bought” in these articles mean purchased and bought from the trustee etc, mentioned in the sections on the representation and in the belief that the transferor had an absolute and not a restricted title. 15 W.R. 24 (P.C.)=14 M.I.A. 1=6 B.L.R. 530; as explained in 18 B. p. 584 & 19 B. p. 144 cited in Mitra's Limitation at p. 1007. See also 14 M.I.A. 144=8 B.L.R. 104 (P.C.); 14 B.L.R. 386; 21 M. 151; 9 A. 97 & 23 B. 614.

(2) “Purchaser”, meaning of :—

(a) “Purchaser” means a person who purchases that which is *de facto* a mortgage upon the representation made to him and in the belief that it is an absolute title. Absence of *bona fides* as distinguished from actual knowledge of the vendor's title, does not prevent the purchaser from claiming the benefit of the article. 19 B. 140.

(b) The expression “purchased for a valuable consideration” in article 134 is limited to a purchaser of the absolute title to, or property in, the subject-matter of the mortgage and does not include the alienee of any lesser interest, such as a mortgagee. 6 M.L.J. 260 following 12 M. 316.

(2-A) A trespasser is not a ‘purchaser’ :—

S. 5 applies only to a *bona fide* purchaser from the mortgagee and not to a trespasser on the possession of a mortgagee. 12 Bom. H.C.A.C. 180.

(8) A lessee is a purchaser :—

Suit brought by the manager of a temple to set aside a certain lease made by his predecessor is governed by this article, a lease being a ‘purchase’ *pro tanto* of the interest thereby assured. 27 B. 373=5 Bom. L.R. 241.

(4) Suit against mortgagee and his vendee :—

Where a suit is brought for redemption against a mortgagee and his vendee, so far as the vendee is concerned, article 134 applies. 19 B. 140.

(5) Mortgagee's mortgagee is a purchaser :—

(a) Where an unfructuary mortgagee mortgages with possession his mortgage to a third person, the original mortgagor can redeem the mortgage by paying the amount due under his mortgage but cannot do so if the second mortgagee had possession for more than twelve years, in which case, the original mortgagor must redeem this mortgage also. A mortgagee from the mortgagee is *pro tanto* a purchaser for value within the meaning of article 134. 22 B. 225.

2.—'Afterwards bought'—'afterwards purchased.'—(continued).

(b) The expression "purchaser for valuable consideration" includes a mortgagee as well as a purchaser properly so called. 15 B. 588.

(c) Where the first mortgagee represents to a second mortgagee that he was absolute owner and was mortgaging his absolute interest, the second mortgagee is a "purchaser" within the meaning of this article and the mortgagor will be bound to redeem such second mortgagee also. 24 M. 471 (F.B.)—Davies, J., dissenting, held that the word "purchaser" means only a purchaser of an absolute title and does not include a mortgagee.

(6) Mortgagee pleading invalid sale :—

A mortgagee or his representative cannot rely on this article in bar of a suit for redemption unless he can show a valid sale by the mortgagor or his representative in the absence of which the possession under mortgage would not lose its original character. 14 M. 38 (42).

(7) Necessity of possession :—

A *bona fide* purchaser or mortgagee from a mortgagee must have possession for more than 12 years in order to validate the transaction as against the original mortgagor. 28 B. 614 = 1 Bom. L.R. 102.

(8) Sale by a predecessor trustee :—

(a) Suit by the *shebait* of an idol for recovery of *debutter* property alienated by a previous *shebait* is governed by article 134 or art. 144, and in either case, it will be barred if brought more than twelve years after the sale. 23 C. 536.

(b) Suit by a succeeding trustee to set aside a sale for value made by the preceding trustee is governed by this article. 27 B. 363 = 4 Bom. L.R. 743.

(c) Where a trust-property is alienated by the trustees, and the alienees have been in possession by purchase for more than twelve years, a suit to recover the property will be barred by article 134, even though it may be for the purpose of restoration thereof to the trust. 27 B. 500 = 5 Bom. L.R. 303.

(d) Where a *Mohunt* in charge of an endowment sells the endowed property, no length of possession during the vendor's lifetime would give the purchaser a valid title as against the successor of the vendor. 20 W. R. 471.

(9) Mortgage by trustee :—

A suit to set aside a mortgage by a preceding trustee is governed by article 134, the article being applicable alike to mortgages and sales for value.

Per BANERJI, J. (referring to 11 W.R.C.R. 36; 15 B. 583; 22 B. 225 & 23 C. 536); 20 A. 482 (F.B.) *

The term "purchased" in the article cannot be taken as including "mortgaged." *Per AIRMAN, J.—Ibid.*

2.—'Afterwards bought'—'afterwards purchased.'—(concluded).

Whether this art. is or is not applicable, the suit is barred by art. 144, the cause of action dating from the time of the mortgagee's obtaining possession. *Per BLAIR, J.—Ibid.*

(10) Law applicable to managers of endowments :—

Since the passing of Act XX of 1863, the ordinary rules of limitation apply to suit in respect of *wakf* property. *Muthuwallies*, or managers of such properties, are no longer servants of Government. 6 W.R. (P.C.), 3; 17 W.R. 430.

(11) Alienation of service lands :—

Lands belonging to a temple cannot be alienated from the temple; but the right, title and interest of a temple servant in lands held as remuneration for services can be alienated; the interest sold being subject, in the hands of the alienee, to be determined on the death of the original holder or on the cessation of the services. 6 B. 596.

(12) Effect of stoppage of religious services :—

The mere stoppage of religious services does not start limitation in the case of *wakf* lands. 16 W.R. 116.

(13) Denial by mortgagee of mortgagor's title :—

Where a mortgage is proved, the denial of the mortgagor's title by the mortgagee in possession would not constitute adverse possession as against the mortgagor. 49 P.R. 1862.

(14) Acknowledgment by mortgagee :—

An admission by a mortgagee, in the course of a conveyance, within sixty years of the original mortgage, of the title of the original mortgagor and the subsistence of the mortgage will be an acknowledgment serving as a fresh start of limitation to the mortgagor. 6 Bom. L.R. 38.

(15) Laches of mortgagor :—

The laches of a mortgagor do not diminish the sixty years of limitation allowed to a suit for redemption. 23 W.R. 99=2 I.A. 49. (P.C.)

(16) See further, No. 3, 21 M. 151, under the heading 'Scope of article', *supra*.

No. 4, 1 A.W.N. 122, 1 A.W.N. 75 & 1 A.W.N. 169, under the heading 'Scope of article', *supra*.

No. 2, 9 B. 373, under the heading, 'Scope of article,' *supra*.

3.—'Purchased from the trustee or mortgagee.'

(1) Sale in Court-auction against mortgagor :—

Where a will devised certain property to a certain person for her life and after her death to her issue, and where such property was sold in execution of a decree obtained against the person first named on a mortgage executed by her, it was held that the purchase in Court-auction was not 'from the mortgagee' but from the mortgagor. To such a case, article 134 was held inapplicable. 6 O.C. 305.

3.—'Purchased from the trustee or mortgagee.'—(concluded).

(9) Auction-purchaser not purchaser from mortgagee :—

(a) Where immovable property of a judgment-debtor, whose interest in it is only that of a mortgagee, is attached and brought to sale in execution of a money-decree, the auction-purchaser is not a 'purchaser from the mortgagee' within the meaning of art. 184, though the property is sold as that of the judgment-debtor without any limitation of his interest therein. 25 M. 99=11 M.L.J. 323 (F.B.), (overruling 12 M. 316, which had held that the article is available even to an execution-purchaser).

(b) The article applies only to a case in which the property is sold voluntarily by the mortgagee himself, and not to a case where it is sold by means of a forced sale in execution. A.W.N. (1908), 56=2 A.L.J. 234 (referring to 25 M. 99 & 9 A. 234).

(3) Auction-purchaser assignee of trustee :—

(a) An auction-purchaser acquiring trust-property for valuable consideration at a sale in execution, is an assignee of the trustee. 15 C. 708.

But see 25 M. 99=11 M.L.J. 323, No. 2, *supra*.

(b) Where property was given to a person for certain pious purposes and as well for the maintenance of that person, and his interest in the property was sold in execution of a decree against him, as between the purchaser at the Court-sale and the donor, art. 184 was held not to apply. 11 C. 121 (P.C.)=11 I.A. 218.

(4) Absence of bona-fides :—

Absence of *bona-fides*, as distinguished from actual knowledge of the vendor's title, does not prevent the purchaser from claiming the benefit of article 184. 19 B. 140.

(5) Suit *re* religious endowments, etc. :—

An endowment for a religious or charitable purpose is excepted from the operation of rules of limitation. No suit, therefore, for its recovery will be barred, until at least the officer entitled to administer it has been in possession of his office for twelve years. 2 M.I.A. 390 (P.C.); see 27 B. 500, which distinguishes this case; see, also, Mitra on Limitation at p. 1007, on this point.

(6) Suit for recovery of trust-property :—

This article applies to a suit for the dismissal of a trustee and for recovery of possession of trust-property alienated by the trustee to a third party. 24 C. 418.

4.—'Purchased for a valuable consideration.'

(1) Applicability of equitable principle :—

The principle on which Courts of Equity in England refuse to interfere against *bona-fide* purchasers for a valuable consideration, without notice, when clothed with a legal title, has no applicability in India. 8 A. 86.

4.—'Purchased for a valuable consideration.'—(concluded).

(2) Purchase without notice of trust:—

Where a purchaser from a trustee purchases for valuable consideration without any notice of the trust, and is in enjoyment for more than twelve years, a claim, against him, to follow the property as trust property will be barred, limitation commencing to run from the date of the conveyance. 2 A. 460; 2 A. 394.

(3) Right of last mortgagee for valuable consideration:—

Where there were several mortgages in respect of the same property and the last mortgagee was a *bona fide* purchaser for valuable consideration, such mortgagee was entitled to the protection afforded by article 134. 11 W.R. 36.

(4) Purchaser from mortgagee—Ostensible ownership:—

A purchaser for valuable consideration from a mortgagee, who, since the mortgage, has become the ostensible owner of the property mortgaged, will be entitled to the protection afforded by article 134. 12 B. 352.

(5) Effect of sale by heirs of mortgagee:—

The sale of a mortgaged property by the heirs of the mortgagee, after an enjoyment for more than 60 years, does not give a fresh cause of action to the representatives of the mortgagor. 16 W.R. 96.

(6) Suit by assignee of mortgagee against purchaser from mortgagor:—

Where there were two mortgages, with right of entry after default, in respect of the same property and one of the mortgagees purchased the interest of the other, a suit by the purchaser-mortgagee to recover possession of the mortgaged property against the purchaser from the assignee in insolvency in respect of the estate of the mortgagor's transferees, brought more than twelve years after default, was barred. 8 B.L.R. 104—16 W.R. 33 (P.C.), 14 M.I.A. 144.

(7) Purchaser for valuable consideration:—

Where a person not interested in the equity of redemption redeems from a mortgagee in possession, he is not a "purchaser for valuable consideration" within the meaning of article 134. 124 P. R. 1683.

(8) See, further, No. 1 (a & b), 13 B. 583 & 9 B. 475, under the heading 'Scope of article', *supra*.

(Old Law.)

Cases under Act XIV of 1859, S. 5:—

- (1) A member of a joint Hindu family, with the consent of other members, usufructually mortgaged certain estate to a person, who sold the same to his principal. In a suit for redemption brought twelve years after the sale of the estate by the principal to the present defendant, the plea of litigation and *bona-fide* purchase, without notice, was set up.

Held, 1st, that the onus lay on the defendant to show the termination of the mortgage and the absolute sale by the mortgagors to the original mortgagee,

(Old Law)—(concluded).

2nd, in the circumstances, that the defendant was not "purchaser" within the meaning of S. 5. 14 M.L.A. 1=6 B.L.R. 530=15 W.R. (P.C.) 24.

- (2) A defendant wishing to obtain the benefit of S. 5 had to show three things :—(1) that he was a purchaser ; (2) that his purchase was *bona-fide* and (3) that he paid valuable consideration. 23 W.R. 99 (P.C.)=1 I.A. 49.
- (3) A suit by the representative of a mortgagor against *bona fide* purchasers from the mortgagees, was governed by the twelve years' rule. 5 M.H.C. 385.
- (4) "*Bona-fide* purchaser" did not necessarily mean a *bona-fide* purchaser without notice ; it meant only an honest purchaser without actual fraud. Hence, purchasers from a mortgagee, for valuable consideration of an estate with a doubtful title, were entitled to the protection afforded by—. 5 W.R. 253.
- (5) Only *bona fide* purchasers from trustees were entitled to the benefit of—. 5 W.R. 238.
- (6)———did not apply to a case of priority of *bona fide* purchase. 7 W.R. 138.
- (7) **Act IX of 1871, S. 134 :—**

The words, 'in good faith' in article 134 and S. 10 of this Act, do not necessarily involve absence of notice in the purchaser of an existing trust or equity, though the fact of there being such notice may be an important element in determining *bona-fides*. 1 B. 269.

135.—Suit instituted in a Court *Twelve years*. When the mortgagor's right to possession determined by a mortgagee⁽¹⁾ for possession of immovable property mortgaged. ⁽²⁾

(Old Acts.)

[Act IX of 1871, art. 135 :—Cols. 1 & 2—Same as above. Col. 3—'When the mortgagee is first entitled to possession.'

Act XIV of 1859 :—No corresponding provision.]

(Notes)**Scope of article.****(1) Suit for possession after foreclosure :—**

The article is inapplicable to a suit for possession by a mortgagee after foreclosure, the mortgagee becoming absolute owner by such foreclosure. 6 C. 566 (Note)=7 C.L.R. 580 ; 7 C.L.R. 583=6 C. 564 ; 90 P.R. 1895 (F.B.)

(2) Usufructuary mortgagee's suit for possession :—

(a) The right of a usufructuary mortgagee to recover possession of the mortgaged property under the terms of the mortgage is governed by this article. 6 A. 551 (559) (P.C.)

Scope of article—(concluded).

(b) A suit by the mortgagee to recover possession of the mortgaged property is governed by this article, the cause of action arising from the date he was entitled to possession. 83 P.R. 1883.

(3) Suit for foreclosure & sale:—

A suit for foreclosure and sale would be governed by this article, if brought against the purchasers of the mortgaged property from the mortgagor. 12 C. 514 = on appeal 16 C. 693 = 16 I.A. 85 (P.C.)

(4) Suit for foreclosure:—

The article is inapplicable to a suit for foreclosure, it being governed by art. 144. 8 C.P.L.R. 65.

(5) Mortgagee not in possession, article limited to:—

The article applies only to cases where the mortgagee is not in actual or constructive possession of the property. 114 P.R. 1890.

(6) Suit by mortgagee against mortgagor-lessee:—

The article is inapplicable to a suit by a mortgagee to recover possession of the mortgaged property against the mortgagor to whom it was leased out. 114 P.R. 1890.

(7) False recital as to delivery of possession:—

Where possession was not given, though the mortgage-deed contained the recital that possession had been given to the mortgagee, a suit by the latter to recover possession is governed by this article and not by art. 118, as it is not a suit for specific performance of contract. 134 P.R. 1898.

(8) Old Acts compared with this Act:—

"Act XIV of 1859 and Act IX of 1871 contained no express provision for a suit for foreclosure. Cl. 12 of S. 1 of Act XIV of 1859 and art. 135 or art. 144 of Act IX of 1871 were applicable to such suits. 26 A. 4 (at pp. 8 & 9) and the cases cited therein"—Mitra on Limitation at p. 1015.

(9) Suit by mortgagee against pre-emptor or his vendee:—

A suit by a mortgagee to recover possession, under a deed of mortgage, against a pre-emptor or his vendee, will be governed by art. 144, the cause of action arising only from the date of the possession becoming adverse to the mortgagee. 8 A. 86 (*distinguishing*, 14 M.I.A. 101 = 8 B.L.R. 122).

(10) Mortgagee by conditional sale:—

A suit for foreclosure of a mortgage by conditional sale, where the specified date of repayment had expired when the Bengal Regulations were in force, and where the right to sue for possession had become barred (under this article), the mortgagee by conditional sale cannot be benefited by art. 147, 3 C.P.L.R. 83.

1.—'Mortgages.'

(1) Mortgagee subsequently becoming purchaser:—

A suit by a usufructuary mortgagee of an entire undivided estate, for possession of a certain share therein, subsequently purchased by him from one not in actual possession at the date of mortgage, instituted more than 12 years after the mortgage, is barred by limitation, as the fact of his purchase did not change his character from a mortgagee to that of an owner. 14 C. 674.

(2) Suit by mortgagee under English mortgage:—

The period of limitation for a suit by a mortgagee for possession of the property mortgaged under an English mortgage-deed will be computed from the date of default; and the pendency of a foreclosure suit will not prevent limitation from running. 6 W.R. 269.

(3) *Bys-bil-wafa* and English mortgage contrasted:—

The transaction of mortgage effected by a *bys-bil-wafa* was essentially the same in regard to the relation between the mortgagor and the mortgagee as an English-mortgage. 22 W.R. 543 = 14 B.L.R. 315.

(4) Character of mortgagee's possession:—

The possession of a mortgagee will retain its original character unless there is a valid sale in his favour subsequent to the mortgage. Otherwise he cannot rely on the twelve years' rule of limitation. 14 M. 88. Cf. 14 C. 674 (No. 1, *supra*).

(5) Mortgagee's rights:—

A mortgagee has the double right to sue for foreclosure or for possession. 7 C. W.N. 11 at p. 20, cited in Mitra's Limitation p. 1010.

(6) When mortgagee can't sue for possession:—

Where a mortgage-deed contains no provision for possession being taken by the mortgagee and foreclosure-proceedings taken by the latter are found to be invalid, he (mortgagee) cannot sue for possession and this article will not apply. 20 C. 269.

2.—'When the mortgagor's right to possession determines.'

(1) Mortgagee's right of suit for possession on mortgagor's default:—

(a) A ———, as agreed upon, brought against the mortgagor and a purchaser from the latter, for possession, will fall under this article. 4 A.W.N. 123.

(b) Where a mortgage-deed empowered the mortgagee to take possession of the mortgaged property on default of payment of the mortgage-money within a certain time and the mortgagee obtained a decree for foreclosure, the cause of action for a suit by the latter to recover possession of the property, from the purchaser thereof from the mortgagor, accrued from the date of default, and the foreclosure-suit did not save limitation. 6 W.R. 188.

(c) Where two mortgage-deeds, in respect of a property, empowered the mortgagees to enter into possession of the mortgaged property after default

2.—'When the mortgagor's right to possession determines.'—(continued).

and the mortgagees obtained foreclosure-decrees against the mortgagor alone, without making the purchaser of his rights a party to the suits, a suit by one of the mortgagees, who had obtained, by transfer, the rights of the other mortgagees also, brought against the purchaser more than twelve years after default was barred. 8 B.L.R. 104 = 14 M.I.A. 144 = 16 W.R. 38 (P.C.)

- (d) Where the mortgage-deed provides that, in default of payment of interest for any year, the mortgagee should get possession of the mortgaged property, a suit to recover possession, by the mortgagee, instituted more than 12 years after the date of first default was barred by limitation. 28 P.R. 1897.
 - (e) A suit to recover possession, by a mortgagee, instituted more than twelve years after the date fixed for the repayment of the mortgage-money, was barred either under this article or art. 144. 35 P.R. 1899.
 - (f) Where the mortgage-deed provides that, in default of payment of mortgage-money, the mortgagor should deliver possession of the mortgaged property to the mortgagee, a suit by the latter to recover possession thereof is governed by this article. 96 P.R. 1890.
 - (g) Where a mortgage-deed contains a provision for default, held that a suit for possession instituted more than 12 years after the date of default was barred under Act XIV of 1869. 11 A. 144.
 - (h) Where a *Kut-kobala* gives to the mortgagee the right to take possession on default of payment, a suit for possession is governed by this article. And if the mortgagee's right to possession is extinguished by the expiry of the period prescribed in this article, his right to take foreclosure-proceedings under Regulation 17 of 1806 will also be extinguished. 14 C. 730 (736) (F.B.).
 - (i) If a mortgage-deed gives the mortgagee a right to take possession upon default in payment of the mortgage-money, the mortgagee has twelve years from the time at which his right to possession commences, in which he may bring his suit for possession. But if the mortgage-deed contains no such stipulation, the right of the mortgagee to take possession would not accrue until after the expiration of the year of grace. 10 C. 68 = 13 C.B.R. 51.
- (3) **Suit by mortgagee against mortgagor and his vendee :—**
- Where a person mortgaged his share in certain property, with a promise to give the mortgagee possession over the property, but sold, subsequently, the share so mortgaged to another person, a suit, by the mortgagee against the mortgagor and the purchaser, to recover possession of the share mortgaged fell within the meaning of this article also. 4 A.W.N. 123.
- (3) **Effect of sale by mortgagor :—**
- (a) Where, by an act of law, there has been an alienation from a mortgagor to a third person, the limitation law applicable between a mortgagor and

2.—'When the mortgagor's right to possession determines.'—(continued).

mortgagee ceases to apply and the ordinary limitation thenceforward applies. 16 W.R. (P.C.), 19=14 Moo. I.A. 107=8 B.L.R. 122.

- (b) But the principle of the above decision would not apply to a case in which the mortgagor, being entitled to be in possession during his life is in possession till his death. In such a case, limitation would not run until the mortgagor's death. 7 C. 394 (399).

(4) Mortgagee dispossessed before discharge of debt:—

- (a) If a mortgagor puts the mortgagee in possession on the distinct understanding that the latter is to be in possession until the debt is discharged in a specified time but subsequently resumes possession, without discharging the debt, the mortgagee may sue for foreclosure; and the Court may decree foreclosure with a direction that possession be delivered to him (mortgagee). 16 M. 64.

- (b) Where a mortgagor resumes possession of the mortgaged property after redeeming a prior mortgage, it gives a fresh cause of action to a *puius* mortgagee and a suit by the latter for possession will lie, the cause of action arising from the date of the mortgagor's resuming possession of the property. 1 A. 235 (P.C.)

(5) Effect of failure to execute foreclosure-decree:—

Where a plaintiff, though he foreclosed his mortgage-right, failed to execute the foreclosure-decree in his favour and the *dur-putneedar*, who paid the revenue to save the *putnee*, remained in possession of the mortgaged property, the latter's occupation of the *putnee*, after his lien on it had expired, was held to be adverse to the plaintiff and limitation held to run against him from that date. 25 W.R. 434.

(6) Suit by intermediate mortgagee against subsequent mortgage:—

In a suit by an intermediate mortgagee to recover possession against the subsequent mortgagee, who has redeemed the prior mortgage, the cause of action arises from the date fixed for the redemption of the subsequent mortgage. 38 P.R. 1894.

(7) Suits by mortgagees by conditional sale:—

- (a) Before the operation of the Transfer of Property Act, a mortgage by conditional sale entitled the mortgagee to possession after the year of grace, where proceedings were taken under Regulation XVII of 1806. If the mortgagee brought the suit for possession after 12 years from the date of the expiry of the year of grace, when the right of the mortgagor to possession "determines," it would be barred. 16 C. 693 (P.C.)=16 I.A. 85.

A right of suit thus barred could not be revived by the subsequent creation of foreclosure-suit by the Transfer of Property Act—*Ibid*.

- (b) The period of limitation for a suit by a mortgagee by conditional sale to recover possession of the mortgaged property was computed from the date of default; no new cause of action arose upon foreclosure. 22 W. R. 90=14 B.L.R. 37.

2.—‘When the mortgagor’s right to possession determines.’—(concluded).

- (c) Where a mortgagee by conditional sale was put into possession from the date of the mortgage and was entitled, under the deed, to hold possession, but was wrongly dispossessed, a suit to recover possession instituted within twelve years from the date of dispossession was held to be in time. 27 C. 185.
- (d) So long as the relation created by a *baye-bil-wafa* subsisted, the possession of the mortgaged property by the mortgagor was not adverse to the mortgagee, i. e., so long as the mortgagor asserted a title to redeem and advanced no other title inconsistent with it, there was no adverse possession. 22 W.R. 543 = 14 B.L.R. 315.

(8) Mortgagee’s suit for possession—Mortgagor dispossessed :—

Where the mortgagor is dispossessed by a person claiming title thereto, the cause of action for a suit by the mortgagee to recover possession of the mortgaged property will count from the date of such dispossession ; if the mortgagor should contest, in a suit, the title of the new holder, limitation would run from the date of the termination of the suit adversely to the mortgagor. W.R. (1864), 375.

(9) Stranger holding adversely to mortgagor :—

Where a person not claiming under the mortgagor holds the mortgaged property adversely to the mortgagor, a suit by the mortgagee to recover possession must be instituted within 12 years from the date of such adverse possession. 2 N.W.P.H.C. 223.

(10) Possession of auction-purchaser adverse to mortgagor :—

- (a) The possession of an auction-purchaser in execution of a decree against a mortgagor is an adverse possession and a suit against such a purchaser will be barred after 12 years. But this does not apply to the case of a *san-mortgage* in Guzarat. 6 B. 193 (20 5.) (F.B.)
- (b) The possession of a purchaser under a decree-sale, without notice of a subsisting mortgage upon the property, being that of an owner, a suit by the mortgagee against the purchaser, founded on a title to enter into possession by reason of some default, should be brought within twelve years from the commencement of the purchaser’s possession. 16 W.R. 19 (P.C.)

(11) Possession of lien-holder not adverse to mortgagor :—

The possession of mortgaged property by a person, who claims a lien on it but admits the mortgagor’s title, cannot be regarded as adverse as against the mortgagor or his successor in title. 10 B. 49.

(12) Suit by purchasers of mortgaged property :—

A suit to recover possession of mortgaged property by the purchaser thereof against a person holding adversely against the mortgagor for more than the statutory period, will be barred by limitation. 4 C.P.L.R. 99.

(General.)

(1) Foreclosure-proceedings by *bye-bil-wafa* mortgages :—

It is not universally true that a mortgagee's proceeding for foreclosure under a *bye-bil-wafa* mortgage cannot be preferred after twelve years, from the expiration of which period the conditional sale will become absolute. 4 W.R. 37 (P.C.).

(2) Effect of the Transfer of Property Act :—

The Transfer of Property Act cannot give a mortgagee a new remedy and give him the benefit of art. 147 of the Limitation Act, when his suit for possession had been barred under this article before it came into force. 8 C.PL.R. 83.

(3) Purchaser not representative of judgment-debtor :—

The purchaser at a Court-sale is not the representative of the judgment-debtor, within the meaning of S. 115 of the Evidence Act. 14 C. 401 (414) : nor within the meaning of S. 244, C. P. Code. 16 C. 355 (360).

(4) *Bye-bil-wafa* :—

A *Bye-bil-wafa* or *Kutkobala* may be redeemed and foreclosed. 7 M.I.A. 323.

(5) Commencement of limitation in foreclosure-suit :—

In a foreclosure-suit, the period of limitation is computed from the time when the mortgagee first becomes entitled to possession. 24 W.R. 433.

(Old Law.)

Act XIV of 1856, s. 1, cl. 12 :—

- (1) Where a mortgage-deed provided that, on default in the payment of the mortgage-money within a certain time, the mortgaged property should be considered as absolutely sold to the mortgagee, and, after default, the mortgagee entered into possession but was subsequently dispossessed by the mortgagor, a suit by the mortgagee in the nature of a foreclosure-suit against the mortgagor, brought more than twelve years after such dispossession, was barred under—. 9 Bom. L.R.A.C. 53.

- (2) Where a *san* mortgagee obtained a personal decree against the mortgagor and the attachment of the mortgaged property in execution of the decree was raised at the instance of the purchaser thereof, in execution of a decree obtained by a third party against the mortgagor, a suit by the *san* mortgagee to have his debt satisfied out of the mortgaged property, not brought within twelve years from the date of the mortgage or of the sale, was barred. 8. B.L.R.A.C. 61.

(3) Art. 135, Act IX, 1871 :—

A suit for possession by a mortgagee should be brought within twelve years after possession became adverse to him. 6 C. 564 = 7 C.L.R. 533.

136.—By a purchaser at a private *Twelve years*. When the vendor is sale⁽¹⁾ for possession of im- first entitled to moveable property sold, possession.⁽²⁾ when the vendor was out of possession at the date of the sale.

(Old Acts.)

[Art. 136 of Act IX of 1871.—Same as above.
Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Application of articles 136 & 137 :—

These articles apply to suits brought by purchasers against third persons in possession of the land, in whose favour limitation runs against the purchaser, in the same way as it would against the owner with whose rights the purchaser is clothed. 15 B. 261 ; 16 B. 722 (726).

(2) Vendor :—

The expression—in this article means a vendor other than the auction-purchaser mentioned in art. 138. 31 C. 681 (F.B.) = 8 C.W.N. 476 ; see also 15 M. 331.

(3) Suit by vendee from reversioner :—

This article and art. 141 ought to be read together. A suit by the assignee from a Hindu reversioner, who is not in possession at the date of the assignment, will not be barred, if it is brought within 12 years of the death of the widow. 8 C.W.N. 535 ; 802.

(4) Suit by purchaser from execution-purchaser :—

If an execution-purchaser at a sale in execution of a decree, the judgment-debtor being in possession at the date of the sale, is barred, a purchaser from him will be equally barred. 18 M. 144.

(5) Suit by assignee of auction-purchaser :—

The article is inapplicable to a suit to recover possession by the assignee of an auction-purchaser at a Court-sale, it being governed by art. 138, the cause of action arising from the date of sale. 23 B. 246 ; 15 M. 331.

(6) Suit by vendee against vendor subsequently recovering possession :—

Where a vendor was, at the time of sale, out of possession and subsequently recovered possession, a suit by the vendee to recover possession from the vendor would be in time, if brought within twelve years from the date of the vendor's recovering possession, though more than twelve years from the date of sale, art. 144 and not this article applying to the case. 12 C. 197.

Scope of article.—(concluded).**(7) Vendor dispossessed before sale by him :—**

Where the vendor was dispossessed by a third person before the date of sale, a suit by the vendee for possession against the latter is not governed by this art., but by art. 142. 16 B. 343.

(8) Purchaser subject to equities :—

A suit by the purchaser of an equity of redemption is subject to the equities of the mortgagee as against the mortgagor-vendor. 18 A.W.N. 67.

(9) Articles 136 & 144 compared :—

A suit by a vendee to recover possession from the vendor after the latter has recovered possession of the property sold is not governed by this art., but by art. 144, the cause of action arising from the date of recovery of possession. 18 B. 424 (428).

(10) Possession of vendor after sale :—

The possession of a vendor after the execution of a sale-deed by him is adverse to the purchaser. If the purchaser, therefore, does not bring his suit for possession within twelve years from the date of sale, he will be barred. Delay in registration of the sale-deed does not stop the running of time. 11 C. 229.

1.—‘Purchaser at a private sale.’**(1) Suit by purchaser, vendor being out of possession :—**

The article applies to a private purchaser from a person not in possession. 25 B. 275 = 2 Bom. L.R. 1021.

(2) Purchase of right and title of vendor :—

A suit to obtain possession by a purchaser, by virtue of a sale of the vendor's right, title and interest conveyed under a private sale, is governed either by this article or art. 144. 2 A. 718.

(3) Purchaser of a share in joint family property :—

This article applies to the suit of a——from a sharer out of possession. 11 C. 680.

(4) Vendor excluded from possession within twelve years :—

A purchaser, suing for possession, would be in time if he succeeds in showing that his vendor's exclusion from possession was within twelve years prior to suit. 23 A. 442.

(5) Vendor's vendor being purchaser at Court-auction :—

In a suit for possession of a tenure by a purchaser, whose vendor purchased it at a private sale from a third person, who bought at an auction but never had obtained possession, the period of limitation should be reckoned from the date when the first vendor first became entitled to possession, i.e., when the sale was confirmed. Art. 136 applied to the case. 23 C. 49. But this case has been overruled by 81 C. 681 (F.B.) = 8 C.W.N. 476 (see Case No. 6 at bottom of p. 1013, *infra*).

2.—'When the vendor is first entitled to possession'

(1) When the cause of action arises:—

(a) A purchaser at a private sale cannot count limitation from the date of his purchase, as the cause of action is not prolonged by mere transfer of title. 4 W.R. 37 (39) (P.C.)

(b) In a suit to recover possession by a purchaser at a private sale, limitation runs from the date of accrual of the vendor's right to sue, and not from the date of the plaintiff's purchase. 3 W.R. 176.

(2) Vendor entitled under a decree under appeal:—

The limitation for a suit by a private purchaser of immoveable property, for possession, from a vendor (who was entitled, under a decree, against which an appeal is pending on date of sale) is twelve years, under either of the said articles from the date when vendor gets possession. 2 A. 718.

See, further, Cases Nos. 6, 7 & 9 under the heading **Scope of article** and Nos. 2, 4 & 5 under the heading No. 1, *supra*.

137.—Like suit by a purchaser *Twelve years*. When the judgment-debtor is first entitled to possession at the date of the sale.

(Old Acts.)

[Art. 137, Act IX of 1871.—All three cols. same as above, except that instead of the word 'judgment-debtor' in the present article, there was the word 'execution-debtor.'

Act XIV of 1859.—No corresponding provision.]

138.—By a purchaser of land at *Twelve years*. The date of the sale⁽³⁾. a sale in execution of a decree for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale.

(Old Acts.)

[Act IX of 1871, art. 138.—Col. 1—same as above, except that, instead of the words 'when the judgment-debtor was in possession at the date of the sale' in the present article, there were the words, 'when he never has had possession.'

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of articles 137 & 138.

(1) Regular suit by auction-purchaser :—

- (a) An auction-purchaser at a sale in execution of a decree may bring a regular suit for possession, when it is shown that an attempt by him in execution-proceedings to obtain possession was unsuccessful. 12 C. 169.
- (b) Cf. 10 C.L.R. 358 & 25 W.R. 372, which held that a regular suit would not lie if no attempt at all had been made by the purchaser to get possession in execution for twelve years after the sale.

(2) Effect of symbolical possession :—

- (a) Symbolical possession, such as is ordinarily delivered by the Nazir by the sticking up of a bamboo or the like cannot save limitation. In order to save limitation, a purchaser ought to take actual possession. If, in taking such possession, he is obstructed by any body, his remedy is by the application provided for by art. 165 or by regular suit. 5 C. 381.
- (b) Symbolical possession given to a decree-holder is equivalent to actual possession as against the defendant-judgment-debtor. As against third parties, it is of no avail. 5 C. 584 (F.B.) = 5 C.L.R. 549; 10 C. 998; 10 M. 17. *see also* No. 3, *infra*.

(N.B.)—The same principle applies also to an auction-purchaser, who obtains symbolical possession and then brings a regular suit for possession against the judgment-debtor. 16 C. 590 [applying 5 C. 584 (F.B.) and overruling 10 C. 402, which had held that a suit for actual possession by an auction-purchaser, who had obtained symbolical possession must be brought within 12 years from the date of sale.]

- (c) Such possession given by Court in execution operates in point of law and fact as a complete transfer of possession from one party to the other. 7 C. 418.
- (d) Delivery of formal possession, in execution of a decree for possession, gives a cause of action, against a defendant, who remains in occupation of the premises in spite of the decree and formal possession, enforceable by means of a regular suit. 11 C. 98; 19 A. 499 = 17 A.W.N. 137.
- (e) Such a suit will be in time, if brought within 12 years from the date of the delivery of symbolical possession to the auction-purchaser-plaintiff. 24 C. 715; 10 M. 58; 4 C.W.N. 297.
- (f) As between the judgment-debtor and his assigns on the one side and the judgment-creditor or auction-purchaser or their assigns or heirs on the other, symbolical possession is as good as actual possession. When the purchaser or his heir or assign is disturbed, in taking possession or while in possession, he may bring a suit against the judgment-debtor or his assign or heir within twelve years from the date of obtaining such symbolical possession. To such a case, art. 144 would apply. 25 B. 358 = 2 Bom. L.R. 1780; 25 B. 275 = 2 Bom. L.R. 1021.

Scope of articles 137 & 138.—(continued).

- (g) As against the judgment-debtor, symbolical possession is as good as actual possession and will give a fresh starting point for a suit by the purchaser to obtain possession from him. It will not be so as against third parties claiming adversely to the judgment-debtor. A suit, therefore, against a third person, for possession, brought more than twelve years from the date of sale will be barred. 16 B. 722; 19 B. 630.
- (h) Where, in execution of a former decree, a person has only obtained symbolical possession, he can maintain a fresh suit for actual possession against the same defendants. 22 B. 667.
- (i) Delivery of formal possession, under S. 319, C.P. Code, can have no effect as actual possession as against a purchaser of the rights of the judgment-debtor, who has previously obtained actual possession. Such formal possession will be effective only as against the judgment-debtor. 21 A. 269.
- (j) In a suit under S. 331, C.P. Code, by the auction-purchaser, who had obtained merely symbolical possession, the defendant in possession can add to his own adverse possession that of his vendor, the judgment-debtor. 18 B. 37.

(3) Decree-holder obtaining formal possession :—

Formal possession given to a decree-holder in execution of his decree is sufficient to give him a fresh cause of action and he or his assigns may sue to recover possession at any time within twelve years from the time when such formal possession was given. It is immaterial that actual possession was not given. 4 C. 870=4 C.L.R. 55. see also cases noted under 2 (b), *supra*.

(4) Applicability of article 137 ?—

- (a) Art. 137 applies to an auction-purchaser of the rights of a judgment-debtor not in possession at the date of the sale. 25 B. 275=2 Bom. L.R. 1021.
- (b) Art. 148 and not article 137 applies to a suit for redemption of an usufructuary mortgage, when the plaintiff has acquired the mortgagor's right by purchase at an execution-sale. 9 A.W.N. 135 cited in *Rivas's Limitation*. at §. 218.

(5) Applicability of article 133 :—

Article 138 applies to an auction-purchaser of the rights of a judgment-debtor in possession at the date of the sale. 25 B. 275=2 Bom. L.R. 1021.

(6) Applicability of article 138—Purchaser from auction-purchaser :—

- (a) The application of article 138 is not confined to the auction-purchaser alone. It also applies to a person claiming through an auction-purchaser, such as an assignee of his right. 15 M. 331; 18 M. 144; 31 C. 681 (F.B.)=8 C.W.N. 476 (*Overruling* 23 C. 49); 23 B. 346 (*dissenting from* 3 W.R. 449).

Scope of articles 137 & 138.—(concluded.)

(b) A suit for possession, by an assignee of the rights of an auction-purchaser brought more than 12 years after the date of the auction-sale will be barred by art. 138, if he had secured no sort of possession, actual or formal, during the interval. 2 A.W.N. 31.

(7) Suit by auction-purchaser by avoiding an obstructor:—

A suit by an auction-purchaser—for possession of the property by avoiding an obstructor—a mortgagee from the judgment-debtor—is governed by art. 138. 6 A. 75=3 A.W.N. 212.

(8) Suit by decree-holder-purchaser for possession:—

A decree-holder-auction-purchaser ought to obtain possession in execution-proceedings. A separate suit for possession against the judgment-debtor will be barred by s. 244, C.P.C. 26 M. 740.

(9) Failure to sue—Extinguishment of title:—

A person holding a title to real property (such as a purchaser at Court-auction), which he cannot reduce into possession without bringing a suit, must sue within the time prescribed by article 137. Otherwise, his title will be extinguished. 7 A.W.N. 92.

(10) Execution-purchaser barred—Assignee barred:—

In a suit by the assignee of a purchaser at a Court-sale for possession, the purchaser not obtaining the sale-certificate and his application for the same being time-barred, the defendant set up a title under a sale by the judgment-debtor executed more than three years after the Court-sale. *Held*, that the assignee was barred, since the execution-purchaser would be barred. 18 M. 144.

1.—‘At a sale in execution of a decree.’**(1) Sheriff's sale:—**

A sheriff's sale on the original side of the High Court of Calcutta is not a sale in execution of a decree. So, the purchaser's title to possession dates from the date of the execution of a conveyance in his favour and not from the date of sale. 8 C. 79.

(2) Purchaser at a revenue sale:—

Where the right of a purchaser at a revenue-sale is declared by a decree of Court as against the defaulter, a suit, brought by the purchaser against the defaulter's tenants within twelve years of such declaration, will be in time, though the suit is brought more than twelve years from the date of sale. 2 M.L.J. 210. *See*, further, cases Nos. 7 (a) & 7 (b) under heading No. 3, *infra*.

2.—‘When the judgment-debtor is first entitled to possession.’**(1) Suit by obstructed purchaser:—**

Where the purchaser at a Court-sale was put in *formal* possession only, a suit for possession by him or his representatives, against the obstructor will be in time, if, within twelve years before the institution of the suit, the judgment-debtor had possession. 4 C. 216.

2.—'When the judgment-debtor is first entitled to possession.'—(concl'd.)

(2) Suit by auction-purchaser of undivided rights :—

In a suit for possession by an auction-purchaser of undivided rights and interests of one of the members of a Mahomedan family, the cause of action arises from the date of the judgment-debtor's rights to sue. 11 W.R. 29 (P.C.) = 12 M.I.A. 866 = B.L.R. 75.

(3) Suit by one auction-purchaser against another :—

A suit by an auction-purchaser for possession of immoveable property against another auction-purchaser, brought more than twelve years after the latter had obtained possession of the property, is barred by limitation. 8 A.W.N. 156.

(4) Suit by auction-purchaser within twelve years of his obtaining possession :—

A suit brought by an auction-purchaser, who had obtained possession of the property through Court within twelve years preceeding the suit, to recover actual possession thereof is not governed by art. 138 and is not barred. 12 B. 678.

(5) Auction-purchaser's suit against private purchaser :—

A suit, for possession by an— auction-purchaser against a purchaser at a private sale from the judgment-debtor, instituted more than twelve years from the date the purchaser has obtained possession of the property sold, is time-barred. 4 B. 89

(6) Suit by purchaser of share of a co-owner :—

Where the purchaser of the share of a co-owner, sold in execution of a decree, brought a suit for partition and redemption of prior mortgages, more than twelve years after redemption by the purchaser at a private sale from all co-owners, the suit is barred, since the possession of the latter became adverse ever since their redemption of the prior mortgages. 20 B. 557.

(7) Suit by purchaser from an auction-purchaser out of possession :—

This article renders maintainable a suit for possession by the purchaser from an auction-purchaser, who had not obtained possession, in execution-proceedings. 9 C. 602.

(8) Adverse possession :—

A purchaser, without possession, suing, twelve years after his purchase, to recover the property from an auction-purchaser thereof, who had obtained possession through Court and discharged a mortgage existing on a portion of the property, will be debarred, so far as property not subject to mortgage is concerned. 16 B. 197.

3.—'The date of the sale.'

(1) Date of sale, commencement of time :—

Where the judgment-debtor is in possession of the land at the time of the sale, a suit by the auction-purchaser for possession of the land is governed by article 188, the cause of action arising from the actual date of sale and not from the date of the confirmation of the sale. 17 M. 89 = M.L.J. 287.

3.—'The date of the sale.'—(concluded).

(2) "Date of sale," meaning of:—

The words "the date of sale," in the article signify the date of the actual sale and not that of the confirmation of such sale. 14 C. 644.

(3) Phrase "Date of sale" in s. 310 A, C.P.Code:—

The———does not mean the date on which the sale is confirmed but the date on which the property is put up for sale and knocked down to the highest bidder. 29 C. 626=6 C.W.N. 776.

(4) "Date of sale" in s. 109 of Bengal Act VIII of 1855:—

The words———mean the date of confirmation of sale and not the date on which the property is put up for sale and knocked down to the highest bidder. 7 C.W.N. 552.

(5) Title of auction-purchaser under Civil Procedure Code:—

An auction-purchaser under the C. P. Code has a good equitable or inchoate title; such title is made absolute and relates back to the date of sale, when the sale is confirmed and the sale-certificate granted. 2 C.W.N. 589.

(6) When limitation for application for possession begins:—

The period of limitation, for a purchaser at a Court-sale to apply for possession, commences from the grant to him of the certificate of sale. 17 B. 228.

(7) Revenue sale:—

- (a) In a suit by a purchaser at a revenue-sale, the period of limitation cannot, under any circumstances, be calculated from a day anterior to the date of purchase. 4 C. 103.
- (b) In a suit for possession by an auction-purchaser at a sale for arrears of revenue, the cause of action arises from the date of the revenue sale. W.R. (1864), 30.

(Old Law.)

- (a) Possession "by proclamation of sale through the *Sudder Ameen's* Court," being only an imaginary possession, did not save limitation. 2 B.L. R. Ap. 29=24 W.R. 419 (Note).
- (b) Where a Zemindar purchased a *putnee* of certain lands in a sale for arrears of rent, a suit by him to recover possession of the lands from a third person, in adverse possession thereof, brought more than twelve years from the date of such adverse possession was barred. 8 W.R. 444.

139.—By a landlord to recover *Twelve years*. When the tenancy is possession from a tenant. determined.⁽¹⁾

(Old Acts.)

[Act IX of 1871 art. 140:—Same as above.
Act XIV of 1859:—No corresponding provision.]

(Note)

This article will, as will be seen from the decisions noted below, be applicable only to those cases where the relationship between the plaintiff and defendant as landlord and tenant has come to an end. Such is the effect of Cols. 1 & 3 of this article read together: the first column indicating the nature of the suit covered by the article, *vis.*, a suit by a landlord to recover possession from a tenant, and the third column indicating the period of time wherefrom limitation has to be counted as against the landlord, which period is the determination of the tenancy; in other words, the period of time when the possession of the defendant, who was once the tenant of the plaintiff, begins to be adverse to the latter, is the starting point of limitation for his suit. So, in every case to which this article is sought to be applied it will have to be seen whether the tenancy has *determined*. Section 111 of the Transfer of Property Act which enumerates the ways in which a tenancy may be determined may be referred to with advantage. Some of the cases noted below may, at the first blush, appear to be irrelevant for the purposes of this article; but they are noted here because they bear on the question of the 'determination of tenancy.'

Scope of article.

(1) Tenant holding over:—

- (a) This article applies to cases where the tenancy has determined, (*i.e.*) to cases in which there has been a cessation of the relationship of landlord and tenant. A tenant holding over after the termination of the fixed period of the lease is one by sufferance; there is no privity between him and the landlord. A suit, therefore, against such a person, will be barred unless brought within twelve years of the termination of the fixed period of lease. *Per JENKINS, C.J.*—24 B. 504 (508)=2 Bom. L.R. 401.

Per CANDY, J.—The possession of such a tenant is wrongful and time begins against the landlord from the expiry of the period of the lease for the fixed period. *Ibid.*

Compare 8 M. 424 & 18 B. 256.

- (b) Time runs against a landlord when the period of a fixed lease expires and not at some indeterminate date after that period. 22 B. 898.
- (c) This article can only apply where the tenancy is proved to have determined and can have no application to a case where it is not terminable. 27 B. 515 (544).

(2) Heirs of life-tenant holding over:—

- (a) Where the heirs of a tenant for life continue in possession, after demise of the life-tenant, without accepting a fresh lease and without paying rent, their possession would not be adverse but permissive until they expressly set up a title of ownership in the property. The landlord's suit to eject, in such a case, would not be governed by this article. 18 B. 256.

Scope of article:—(concluded).

- (2) Where, after the death of a tenant-at-will, his heirs continued to remain in the house occupied by him, such occupation by the heirs could not be adverse to the landlord in the absence of proof to that effect and a suit for possession of the house was governed by S. 1, cl. 12 of Act XIV of 1859. 4 Bom. H.C.A.C. 155.

(3) Tenant holding over after determination of lease:—

Where after the determination of a lease for a certain period, the tenant does not pay rent to the landlord, or there is no such assent by the landlord as to constitute a tenancy under S. 116 of the Transfer of Property Act, the tenancy is determined and the tenant's possession becomes adverse; and a suit for ejectment must be brought within twelve years from the date of the determination of the tenancy. 1 A.L.J. 201.

(4) Possession of tenant holding over—Burden of proof:—

- (a) If a tenant for a fixed period holds over, time does not begin to run against the landlord until the tenancy by sufferance has been determined. It is for the tenant to show that the determination of the tenancy at sufferance took place more than twelve years before suit. 8 M. 424; 21 M. 158 (160).
- (b) Cases of tenures permanent in their nature and not determinable by notice are not governed by this article. 9 C. 411=11 C.L.R. 508.

(5) Suit for possession on allegation of permissive occupation:—

When plaintiff sued for possession from defendants on the allegation that defendants had been in permissive occupation of certain premises without the payment of any rent for more than 12 years before suit and defendants set up a gift from plaintiff's father, and they had not acknowledged plaintiff's title within 12 years prior to suit, plaintiff's suit was held to be barred under art. 142, this article being held not applicable to the case. 5 C. 679=5 C.L.R. 527.

(6) Tenant holding over:—

- (a) A landlord may, in the absence of consent on his part or the creation of a new tenancy, treat a tenant holding over after the expiry of the term of the tenancy as a trespasser. 15 W.R. 138.
- (b) Where a tenant is holding over and no new tenancy is created either by receipt of rent or in any other way, the Zemindar is entitled to evict him without the intervention of a Court. 25 W.R. 201.

(7) Position of tenant holding over:—

A tenant holding over after the termination of a tenancy for a fixed period is in the same position as one holding without a puttah. Neither of such tenants can be ejected without a notice to quit. 7 C. 710.

(8) Suit by landlord against tenant—When cause of action arises:—

In a suit by landlord for possession against his tenant, the cause of action arises from the date of the determination of the tenancy and there can be no adverse possession so long as the tenancy continues. 8 W. R. 55.

*1.—When the tenancy is determined.***(1) Determination of Kulkarnam lease :—**

A *kulkarnam* lease in Malabar, is a lease for an indefinite period and it does not determine on the expiration of twelve years from the date of the lease, the customary law of Malabar not determining the lease at the expiration of twelve years, although it protects the tenant from redemption or ejectment until the expiry of twelve years from the date of the lease. 25 M. 452.

(2) Determination of intermediate holder's rights :—

Where a tenant is legally in possession paying rent, whether as a ryot or as the holder of an intermediate tenure, his right of possession must be legally determined before a suit for possession is brought by the landlord. 13 W.R. 267 = 4 B.L.R. Ap. 86.

A.—Cases of forfeiture.**(1) Remedy of landlord claiming by forfeiture of tenancy :—**

Where a tenant denies a landlord's title and where the landlord claims that the tenancy has been forfeited, his remedy is by a suit for ejecting the tenant on the ground that the tenancy has determined and not by a suit on title as owner. 13 M.L.J. 475.

(2) Denial of title—Forfeiture—Notice to quit :—

A tenant, merely repudiating the particular holding attributed to him but not questioning the landlord's right to receive rent, does not forfeit his tenure. Such a tenant can only be ejected after notice to quit. 13 C. 248.

(3) Tenant's attornment to a stranger :—

A ——— is not an assertion of possession adverse to the lessor so as to put an end to the relationship of landlord and tenant. 15 C. 527.

(4) Permanent lease—Denial of title—Forfeiture :—

Even a permanent lease is liable to forfeiture on account of the denial by the lessee of the landlord's title. 24 C. 440.

(5) Effect of denial of landlord's title in previous rent-suit :—

The rule that a denial of a relationship of landlord and tenant does not entail a forfeiture does not apply when such denial is given effect to by a decree of Court. If, in a previous suit, for rent, the tenant had denied the title of the landlord and the latter brings a suit for *khas* possession, such suit will be maintainable. 2 C.W.N. 755.

(6) Occupancy ryot—Denial of landlord's title—Forfeiture :—

An occupancy ryot, by denying his landlord's title, forfeits his occupancy rights and renders himself liable to eviction. 6 C. 436.

(7) Notice to quit—Forfeiture—Denial of title :—

(a) Before the Bengal Tenancy Act became law denial by a tenant of the landlord's title created a forfeiture. 6 C. 55; 10 C. 41; 17 C. 196.

1.—‘When the tenancy is determined.’—(continued).

A.—Cases of forfeiture.—(concluded).

- (b) Where a forfeiture was completed before the Bengal Tenancy Act, and a suit is brought for ejectment after that Act came into force, the tenant cannot seek the protection against forfeiture afforded by that Act. 17 C. 196.

(8) Notice to quit—Denial of landlord's title:—

A tenant denying a landlord's title forfeits his right to a notice to quit. The denial must be *before* suit by the landlord to eject. The setting up of a *Mulgeni* right is not such a disclaimer of title. 17 M. 218.

(9) Notice to quit unnecessary in cases of forfeiture:—

Under the general law, a tenant incurring a forfeiture by denying the title of the landlord may be ejected without a notice to quit. 20 C. 101.

B.—Surrender of lease.

(1) Surrender of lease:—

- (a) The tenures of *putnidars* or other permanent intermediate holders cannot be put an end to by their relinquishment even after notice to the landlord. 9 C. 671.

- (b) A Zemindar accepting such relinquishment is not in a better position than the assignee of the tenure-holder. If adverse possession had been acquired by a third person against the tenure-holder, the Zemindar would be affected by such adverse possession in the same way as the tenure-holder would be. 26 C. 460.

(2) Effect of surrender:—

The surrender, by a tenant, of his interest for a term to the landlord cannot determine the interest of his under-tenant. 10 W.R. 384.

(3) Lessee's taking permanent lease tantamount to surrender of original lease:—

If, during the continuance of a lease for a fixed term, the lessee takes a permanent lease from the landlord, this would operate in law, as a surrender of the original lease. But if the landlord repudiates the subsequent perpetual lease, such repudiation will have the effect of nullifying the surrender. 15 M. 166 (168).

(4) Wrongful surrender to Government:—

The wrongful surrender of an Inam to the Government by the Inamdars cannot alter the nature of the relationship between a sub-lessee from an Inamdar and his lessee. 18 B. 260.

C.—Notice to quit.

(1) Tenancy how determined:—

- (a) It is optional with a landlord to determine or not a tenancy from year to year. Mere setting up, on the part of the tenant, of a permanent right of occupancy or repudiation by the landlord's title to the knowledge of

1—'When the tenancy is determined.'—(continued).

C.—Notice to quit.—(continued).

the landlord cannot have the effect of determination of a tenancy. A tenancy can be determined only by the *landlord's* evincing an intention to determine it (i.e.) of his intention to exercise his option. 24 M. 246 (251).

- (b) To terminate a tenancy, the tenant must have knowledge of the notice to quit and a mere advertisement in a newspaper cannot constitute such a notice, nor can such an advertisement entitle the tenant to set up an adverse possession as against the landlord. 7 B. 474.
- (c) A notice to quit, by means of a registered letter, sent by post and returned with an endorsement by the Postal peon or officer to the effect that the addressee refused to accept it was *held* sufficiently served for the purpose of terminating the tenancy. 15 C. 681.

(2) Notice to quit—Annual tenancy:—

- (a) An annual tenancy can only be determined by a notice to quit at the end of the year of the tenancy. 6 C.W.N. 69.
- (b) A tenant holding under a *kabuliyat* with an annual rent reserved is entitled to six months' notice expiring at the end of a year of the tenancy before he can be ejected. 24 C. 720.

(3) Notice to quit—Suits under Bengal Tenancy Act:—

- (a) A suit to eject an under-*raiyat* cannot be maintained without a notice to quit; the suit itself cannot be regarded as a notice. 2 C.W.N. 238; 6 C.W.N. 69.
- (b) There is no rule requiring that a notice to quit in cases under the Bengal Tenancy Act should be served through Court. It is enough if it is served in the manner provided by the Civil Procedure Code for service of notices. 3 C.W.N. 215.
- (c) A ——— sent by post is bad in law and a suit based upon such a notice will be liable to dismissal. 27 C. 774.

(4) Notice to quit—Suits under the Transfer of Property Act:—

- (a) Where a notice addressed to all the joint tenants living in commensality was handed over to one of them and he signed an acknowledgment thereon, the service was *held* sufficient. 4 C.W.N. 572.
- (b) A notice not giving clear 15 days will be bad. Service of notice through the Post Office, provided it is proved that the Post peon tendered the same to the party or his servant or to one of his family, is sufficient. 4 C.W.N. 790; 28 C. 118.

(5) Notice to quit—Eviction of under-ryot—Denial of title:—

An under-ryot is not liable to eviction, without notice, notwithstanding the fact that he denies the landlord's title, because, in all cases, governed by the Bengal Tenancy Act, a ryot does not incur forfeiture by denying the landlord's title. 20 C. 101.

1- 'When the tenancy is determined.'—(continued).

C.—Notice to quit.—(concluded).

(6) Notice to quit—Resumption of service lands:—

A holding of lands (granted for services) without rendering the services, for more than twelve years, does not legitimately lead to the inference that the tenure is of a permanent character; but the grantor cannot, in such cases, resume the lands without giving a proper notice to quit. 22 C. 988.

(7) Notice to quit—Disclaimer during suit:—

A disclaimer of the landlord's title for the first time during the suit by the landlord for ejectment does not disentitle the tenant to notice to quit. 17 M. 218 (219); 15 M. 123.

(8) Notice to quit, sufficiency of.—

A suit for ejectment is itself a notice to quit. 23 C. 200.

But this rule would not be applicable to suits for ejectment under the Bengal Tenancy Act. 2 C.W.N. 298; 6 C.W.N. 69.

(9) Notice to quit—Occupant licensee:—

No notice to quit was necessary to evict a person, who was allowed to occupy the lands of village mirasdar in consideration of his doing the village blacksmith's work and who defaulted to do the service. 16 M. 97; C.J. 4 C. 67.

D.—Adverse possession of tenant.

(1) When permissive possession becomes adverse.—

(a) The permissive possession of land by an occupant becomes adverse from the date of the denial of the owner's title. 12 W.R. 167.

(b) Where, by an agreement, a tenancy or permissive occupation of certain immoveable property was to end on a certain date, limitation begins to run only from that date and not from the date of the execution of the agreement. 28 B. 288.

(2) Tenancy established within the statutory period.—

Where the relationship of landlord and tenant is established within twelve years prior to the suit, the tenant cannot set up the statute of limitation as a bar to the suit by the landlord. 25 W.R. 56.

(3) Plea of tenancy and limitation in the alternative:—

(a) A tenant may plead tenancy and limitation in the alternative. 7 C.W.N. 294.

(b) Where a plaintiff denies the permanent tenancy set up by the defendant and sues to recover possession of the land, held that the defendant can set up the plea of tenancy and, at the same time, rely on the statute of limitations. 7 B. 96.

(c) In a suit for possession brought against a tenant, who is really a trespasser, the defendant does not, by merely alleging himself to be a tenant, preclude himself from setting up limitation. 21 W.R. 70 (F.B.) = 12 B.L.R. 274.

*I.—When the tenancy is determined.—(continued).***D.—Adverse possession of tenant.—(continued).**

(d) A tenant may, while admitting the title of the landlord and paying rent to him, set up adverse possession of a partial interest so as to defeat the landlord's right to eject him. He may plead that the tenure on which he holds is such as to disentitle the landlord to eject him. 21 B. 509 (516).

(e) A tenant from year to year or for a term of years or as mortgagee, cannot, by setting up, during the continuance of such relation, any title adverse to that of the landlord or mortgagor, acquire by the operation of the law of limitation, title as owner. In the case of a mortgage, the title of the mortgagor will be extinguished after the expiration of the period prescribed for the redemption of the mortgage, and in the case of a lease, the landlord's title can be extinguished only at the expiration of the period prescribed by this article. 25 M. 507--12 M.L.J. 119.

(4) Contract origin of possession—No adverse possession:—

So long as a contract, express or implied, subsists between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be pronounced adverse just as, in the case of a tenant, mere non-payment of rent for more than twelve years cannot make his possession adverse as against the landlord. 7 B. 34.

(5) Possession under invalid grant from strangers:—

The possession of a person, claiming under an invalid grant from a stranger, is not the possession of the lessee of the owner. It is adverse to the real owner from the moment it commences. Such possession, if it continues for more than 12 years, will give a statutory title to the possessor against the owner. 4 C. 327.

(6) Defendant entering under temporary leases:—

A suit for possession of property, instituted within 12 years from the date the plaintiff had knowledge of the adverse title set up by the defendants, who had entered into it under temporary leases since determined, was within time. 12 B.L.R. 283 (Note).

(7) Commencement of adverse possession—Tenant setting up permanent tenure:

Where an ordinary tenant sets up a permanent tenancy to the knowledge of the landlord and the latter does not take any steps to eject such tenants for more than twelve years, the tenants acquire a permanent tenancy right by prescription and the landlord's title to eject will be barred, notwithstanding the fact of his receipt of rent throughout. In such cases, adverse possession commences from the moment the permanent tenancy is set up to the knowledge of the landlord. 14 C. 323.

(8) Intermediate holders pleading limitation against landlord:—

Intermediate holders claiming as *mokurrurree* lessees, can plead limitation against their landlord. 15 W.R. 232.

1.—'When the tenancy is determined.'—(continued).

D.—Adverse possession of tenant.—(continued).

(9) Possession under trespasser:—

Possession of persons claiming under a trespasser is adverse to the real owner from the moment such possession commences. 18 M. 467.

(10) Assertion of adverse title—Knowledge of landlord:—

The assertion of an adverse title by the tenant must be made to the knowledge of the landlord. 9 B. 419.

(11) Notice of claim of perpetual tenancy:—

A mere notice, by a person holding for his life that, he claimed to be holding on a perpetual or hereditary tenure, would not make his possession *adverse* so as to bar a suit for possession by the landlord after the expiration of the life-tenancy. 27 C. 156 (P.C.) = 26 I.A. 216.

(12) Inamdar's suit in ejectment—Subsistence of mirasi tenure:—

Where an Inamdar sues to eject defendant as a trespasser and the latter asserts that he is (and the Court finds him to be) a Mirasidar, and the *mirasi* tenure is still subsisting, the Inamdar cannot succeed in the suit. 19 B. 138.

(13) Tenant's acquisition of permanent right of occupancy by prescription:—

(a) Where a tenant, alleging a perpetual tenancy, successfully resists the landlord's attempt to dispossess him for more than 12 years, a suit by the landlord for ejectment of the tenant would be barred. 21 B. 509.

(b) Where a tenant is allowed by the landlord to assert the validity of an invalid lease for more than 12 years, the landlord would be debarred from questioning the right of the tenant to hold under its terms. 21 B. 509.

(c) If a yearly tenant continues in occupation of premises let after the determination of the tenancy, he does so as a trespasser; and if he continues paying rent, setting up a permanent right of occupancy for more than twelve years, he acquires, as against the landlord, a permanent right of occupancy by prescription. 26 M. 535. (Compare 25 M. 507 at p. 513 & 21 B. 509).

(14) Payment of rent to third party:—

A disobedience by the tenant, known to the landlord and accompanied by payment of rent to a third party, does not—at any rate, as long as the term of the tenancy lasts—make the tenant's possession adverse. 21 M. 153 (160).

(15) Effect of payment of renewal-fee:—

Where a renewal-fee is paid by a tenant and the landlord agrees to demise the land on *kanam* and the tenant continues in possession, the landlord will not be entitled to eject him (the tenant). 21 M. 291.

1.—'When the tenancy is determined.'—(continued).

D.—Adverse possession of tenant.—(concluded).

(16) Tenant's unilateral act, effect of:—

The unilateral act of a tenant cannot alter the character of his title and make his possession adverse to the landlord. 186 P.R. 1888.

(17) Monthly or yearly tenancy—When limitation runs against landlord:—

Tenancy of a dwelling-house will, in the absence of evidence to the contrary, be presumed to be one from month to month; and unless and until such tenancy is legally determined as provided by S. 111 of the Transfer of Property Act, limitation would not run against the landlord. 26 M. 488; 25 M. 507.

(18) Suit for recovery of land granted by a preceding ghatwal:—

A suit by a succeeding *ghatwal* to resume land granted by his predecessor on permanent tenure, must be brought within twelve years after his succession to the estate. Otherwise, it will be barred under art. 144. 9 C. 411. Cf. 12 C. 484 (493) = 12 I.A. 188 (P.C.).

(19) Protection of non-occupancy ryots:—

Non-occupancy ryots settled on lands by a trespasser are protected from ejectment, as trespassers, by the true owner, under the Bengal Tenancy Act, the latter having obtained possession from the trespasser in execution of a decree obtained against the trespasser. 20 C. 708 (F.B.).

(20) Encroachment by tenant enures for benefit of landlord:—

Encroachments, made by a tenant on a third person's land during the continuance of the tenancy, enure for the benefit of the landlord, so that, if a tenant acquires, by adverse possession, a title to land as against a third person, such acquisition will benefit the landlord. 10 C. 820. Cf. 22 W.R. 247.

E.—Payment of rent—Proof of tenancy.

Payment of rent proves the relation of landlord and tenant; and where such relationship exists, there can be no question of limitation. 25 W. R. 66.

F.—Effect of non-payment of rent.

(1) Grant of pattah by Government:—

Non-payment of rent for over twelve years and the grant of a pattah by Government to the defendant-tenant, the Government not claiming any interest adverse to the landlord, were held to create no possession in defendant adverse to the landlord-plaintiff. 8 M. 118 (following 4 C. 814).

(2) Non-payment of rent no adverse possession:—

(a) Mere non-payment of rent for over 12 years does not give an occupancy-tenant an independent title to land, when he acknowledges the title of a landlord. 4 C. 661.

1.—When the tenancy is determined.—(continued).**F.—Effect of non-payment of rent.**—(concluded).

- (b) Mere non-payment of rent, though for over 12 years, is no proof of the determination of the relationship of landlord and tenant when such relationship has once been proved to exist. A tenant contending that the relationship has ceased ought to prove the fact affirmatively. 4 C. 314.
- (c) The mere non-payment of rent cannot constitute adverse possession. 6 W.R. 218; 2 A. 517 (F.B.); 7 B. 40; 9 B. 419.
- (d) The non-payment of rent to the landlord and payment of *kist* to the Government treating the land as *khalsa* cannot make the tenant's possession adverse. 18 B. 250.
- (e) Where the defendant had recognised the proprietary right of the plaintiff, the subsequent non-payment of the dues to the latter or the repudiation of his title will not determine the relationship of landlord and tenant, unless the plaintiff had acquiesced in the act of repudiation. 18 P.R. 1888.

(3) Refusal to pay rent :—

Refusal to pay rent to the rightful owner, coupled with a payment to another, is a virtual dispossession of the rightful owner. 18 B. 51 at p. 58.

(4) Payment of rent to plaintiff's vendor saving limitation :—

In a suit for possession of land with *meane profits*, the payment, by the defendants, of a part of the profits to plaintiff's vendors within twelve years prior to the suit was *held* sufficient to save limitation. 21 W.R. 130.

(5) Admission of tenancy—No adverse possession :—

Where there is an admission of tenancy and no finding to the contrary, there can be no adverse possession, even though the plaintiff has not had *khaz* possession for twelve years. 24 W.R. 113.

(6) Tenant rendering himself liable to ejectment :—

A tenant refusing to render services incidental to his holding is liable to ejectment. 4 C. 67.

G.—Landlord's suit against trespassers.**(1) Landlord's rights to sue trespassers :—**

- (a) A landlord cannot sue to eject a trespasser on land leased, as long as the lease is subsisting and valid. He can do so only after the expiry of the lease. 8 W.R. (C.R.) 55 at p. 58; 21 M. 288.
- (b) Though a landlord cannot, so long as a tenancy continues, sue for *khaz* possession of lands trespassed upon by a third person, he can, when his title is in jeopardy, bring a suit for a declaration of his title as against the trespasser. 10 C. 1076.

I.—‘When the tenancy is determined.’—(continued).

G.—Landlord’s suit against trespassers.—(concluded).

(c) Where land, while it is in the possession of a lessee, is trespassed upon by a trespasser, adverse possession against the landlord commences only on the expiry of the lease, and not from the date of the trespass. The landlord may sue the trespasser in ejectment, within twelve years from the expiry of the lease. 10 C. 577.

(2) Dispossession of *ijaradar* or lessee—Adverse possession against lessor:—

Possession of a trespasser during the currency of an *ijara* lease is not adverse to the landlord, adverse possession against whom commences only on the expiration of the *ijara* lease. 13 C. 101.

(3) Suit for lands wherefrom tenants are dispossessed:—

If land be in possession of ordinary tenants of the plaintiff, and if they were paying rent to the defendant, the latter’s possession will be adverse to the plaintiff, and he must sue for possession within twelve years. If the tenants had been paying rent to the plaintiff up to a period within twelve years before suit, the suit will not be barred. If the land had been in possession of the plaintiff’s *ijaradars* for a fixed period, and if the *ijaradars* were dispossessed, the cause of action for the plaintiff would arise only on the determination of the *ijara*. 1 C.W.N. 216.

(4) Zemindar’s reversionary interest:—

In the case of a *putni* or other permanent tenure, the Zemindar retains what may be called the ‘reversion of the proprietary interest’:—*I’er Lord Hobhouse* in 15 C. 756 (at p. 760) = 15 I.A. 97 (P.C.) cited in *Mitra’s Limitation*, at p. 4024.

H.—Burden of proof.

(1) Burden of proof—Determination of tenancy:—

(a) Where the relation of landlord and tenant is shown to have existed at one time, it lies upon the defendant-tenant to show that the relationship was put an end to more than twelve years before suit. 3 M. 118.

(b) If a tenant, sued by his landlord, were to set up limitation, it is for him to show, even in cases in which he is a tenant by sufferance, that the tenancy was determined more than twelve years before suit. 8 M. 424; 21 M. 153 (160).

(c) In a suit for ejectment by the landlord, he must show that the tenancy has ceased to exist, either by the expiry of the term of the lease or by service of notice. 25 W.R. 56.

(d) Where the plaintiff proves that the commencement of the defendant’s possession was as tenant, it is for the defendant, who pleads limitation, to show when the nature of his possession was changed and how it became adverse. 12 W.R. 250.

H.—Burden of proof.—(concluded.)

- (c) Where a plaintiff sues to eject defendant on the allegation that the latter is a tenant, and the latter denies the tenancy, the former must prove that he (plaintiff) had been in possession within twelve years prior to suit. 24 A. 90.
- (b) Where, in a suit to recover possession of land on the allegation that defendant was tenant, the defendant pleads adverse possession, and it is proved that the defendant admitted the plaintiff's ownership of the land up to a certain period, it will lie upon the defendant to show when the adverse possession under art. 144 commenced or when under this article his tenancy determined. 26 B. 442 = 4 Bom. L.R. 99.
- (c) Where the defendant admits the tenancy but sets up an adverse title, he must show that he has been holding adversely to the knowledge of the plaintiff for more than the statutory period. 110 P.R. 1881.
- (d) The possession of a tenant-at-will of land subject to payment of quit-rent does not become adverse to the landlord as long as the former continues to pay the quit-rent; adverse possession will commence when the tenant actively asserts the claim of a perpetual tenant. 18 B. 507 (512).

140 —By a remainder-man, a re- *Twelve years.* When his estate falls
versioner⁽¹⁾ (other than a _____ into possession⁽³⁾.
landlord)⁽²⁾, or a devisee,
for possession of immov- .
able property. .

[Art. 140 of Act IX of 1871.—Same as above
Act XIV of 1859.—No corresponding provision.]

Scope of article.

The words, 'cause of action' in Act XIV of 1859 referred not to a new cause of action accruing to the reversionary heir personally, but to the cause of action which accrued to the heir or representative, for the time being, of the deceased. 9 W.R. 505 (F.B.)=B.L.R. Sup. Vol. 1008.

But under this article and art. 141, the cause of action to the reversionary heir accrues only when the estate falls into possession, (i.e.) at a time when he becomes entitled to take possession by the death of the tenant for life &c.

Scope of article—(concluded).

(2) Suit by devisee :—

Suit by a devisee to recover possession of immovable property and for a declaration that an alleged adoption, in virtue of which defendant was in possession, was invalid or never took place is governed by this article and not by art. 118, the prayer for declaration being subservient or auxiliary only to the prayer for possession. 21 B. 159.

(3) Claim must be under independent title :—

Both the articles 140 & 141 refer to suits by persons claiming under an independent title. *Per WILSON, J.*

Hence art. 141 did not apply to a suit by a Mahomedan for the recovery of the share of his mother, of which she was never in possession. 12 C. 594.

(4) Applicability of article :—

Suit brought by an adopted son to set aside an alienation made by his adoptive mother more than 12 years before the date of suit but less than 12 years from the date of adoption, is not barred, whether this article or 144 applied to the case. 19 B. 809.

(5) Reversioner coming in after Hindu widow :—

A suit for possession of immovable property by a reversioner entitled to it on the death of a Hindu widow, is not governed by this article, but by art. 141, the cause of action arising from the death of the widow. 14 A. 156 (F.B.); 23 A. 448 & 25 A. 495.

(6) Suit when estate has fallen into possession :—

Where an estate has fallen into possession, a suit to recover possession thereof by a person entitled thereto is governed by this article. 24 B. 260 (281).

1.—‘Remainder-man, a reversioner or devisee.’

(1) Meaning of the terms :—

The terms ‘remainderman,’ ‘reversioner’ and ‘devisee’ used in this article are probably used as technical terms of the English law (155 P.R. of 1888; 48 P.R. 1885 & 116 P.R. 1900) cited in Rivaz on Limitation at p. 222.

(2) Suit by assignees of devisee :—

Where a will gave certain property to the daughter of the testator for life and then to her issue, a suit by the assignees of one of the sons of the daughter after the latter's death for recovery of the property from a person who purchased the same in execution of a decree obtained against the daughter within 12 years of the death of the daughter was held governed by this article or art. 144 and to be in time. 6 O.C. 305 (321).

(3) Property alienated by Hindu widow—Adopted son's rights :—

If a Hindu widow in possession of her deceased husband's estate alienates a portion of it and then makes an adoption and if the alienation be not for a necessary purpose, the property alienated would vest in the adopted son as a vested remainder to fall into possession at the death of the widow.

The adopted son's cause of action would arise at the death of the widow. M. 143.

2.—‘Other than a landlord.’

(1) Meaning of the expression :—

The expression ‘other than a landlord’ means other than a landlord as such suing his tenant. So it was held that a suit by a landlord, suing for possession within 12 years of the expiry of an *ijara* granted by him for a fixed period but beyond 12 years from the date of the trespass by a stranger as against the *ijaradar*, was not barred. 9 C. 367 (370) = 12 C.L.R. 19.

(2) Landlord's right to re-enter on forfeiture of lease :—

A lease, though it may be a permanent one, is liable to forfeiture on the lessee's denial of the landlord's title. In such a case, the landlord will have a right to re-enter and take possession of the premises. 24 C. 440 = 1 C.W.N. 321.

(3) Suit by lessor's heirs :—

Ordinarily a reversioner's cause of action against his ancestor's lessee would not arise until the expiration of the lease. 8 W.R. 135.

3.—‘When the estate falls into possession.’

(1) Grant in lieu of maintenance, resumption of :—

A—may be resumed by the grantor or his heirs after the death of the grantee. But, if the grantee set up a right to hold in perpetuity to the knowledge of the grantor or his heirs and the latter allow a period of more than 12 years to elapse without any action being taken, a suit for resumption will be barred. 3 C. 793.

(2) Property alienated by a Hindu widow—Adopted son's rights :—

If a Hindu widow in possession of her deceased husband's estate alienates a portion of it and then makes an adoption and if the alienation be not for a necessary purpose, the property alienated would vest in the adopted son as a vested remainder to fall into possession at the death of the widow. 26 M. 143.

(3) Postponement of devisee's possession :—

The mere fact that there is a provision in a will to the effect that the property devised should be in the possession of a manager until the person in whose favour the devise is made should attain the age of 30 years would not prevent the estate from ‘falling into possession’ immediately on the death of the testator. 17 C. 272 (276).

(4) Suit by devisee :—

A suit for possession of property left by a will must be brought within twelve years from the date of the testator's death. 14 C. 801 = 14 I.A. 168 (P.G.).

(5) Suit by heirs of grantee for life :—

Where a grant of immovable property is made to a certain person for enjoyment during the latter's life, the starting point of limitation for a suit by the grantor's heirs, the grantee being dead, will be 12 years from the death of the grantee. 12 C. 121 = 11 I.A. 218 (P.G.)

3.—‘When the estate falls into possession.’—(concluded).

(NOTE).—(1) The Privy Council decided the above case on the ground that the suit was governed by art. 144.

(2) The suit might fall under this article. See *Mitra's Limitation*, p. 1080.

(6) Gift of life-interest by a Malabar Karnavan :—

Where a preceding *karnavan* of a Malabar *tarwad* made a gift of a life-interest in his self-acquired property, a suit, brought by a succeeding *karnavan*, within twelve years from the death of the donee, was held not barred, because the estate fell into possession on the death of the donee. 14 M. 495.

(7) Suit by a succeeding ghatwal for resumption of an under-tenure :—

The possession of an under-tenure-holder will not be adverse to the grantor (a *ghatwal*) until the former sets up the permanency of the under-tenure, so that a succeeding *ghatwal* will not be barred, if he brought his suit within twelve years from the time the tenure-holder set up the permanency of the tenure. 12 C. 484 = 12 I.A. 188 (P.C.), reversing 9 C. 411.

(8) Heritable estates not successive life-estates :—

Case in which the Privy Council decided in respect to a religious endowment, that heritable estates could not be created to take effect as successive life-estates. 28 M. 271 = 27 I.A. 69 = 10 M.L.J. 29 (P.C.)

(9) Adverse possession against vatandar :—

Where, during the life-time of a *vatandar*, the *watan* lands are held adversely by another for more than twelve years, a suit by the succeeding holders of the *watan* to recover the lands would be barred. 9 B. 198.

(10) Suit by collaterals of sonless proprietor (Punjab) :—

(a) A suit by the collateral heirs of a sonless proprietor in Punjab for possession of immoveable property sold by the latter to the defendant, was governed by art. 144 and not by this article. 116 P.R. 1890.

And in such a suit the cause of action would accrue from the date of the death of the sonless proprietor. 19 P. R. 1895 (F.B.)

(b) A suit by a reversioner for possession of immoveable property in the hands of the defendant, claiming under a mortgage-deed executed by the late owner thereof, on the ground that the mortgage was without consideration and not binding on him, is governed either by this article or art. 144. 155 P.R. 1883.

(11) Mother barred—Son's heirs not barred :—

Where a mother succeeds to property as heir of her son, and her right thereto becomes barred by adverse possession, the next heirs of her son, on her death, will have 12 years therefrom in which to sue for possession of the property. 11 C. 791.

- 141.**—Like suit by a Hindu or Mu- *Twelve years.* When the female
hammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female⁽¹⁾. dies⁽²⁾.

(Old Acts.)

[Act IX of 1871, art. 142 :—Col. 1 :—Like suit by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow. 2nd column—same as the present second column. 3rd column—When the widow dies.

Act XII of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Suit by heir-at-law :—

The article does not apply to a suit by an heir-at-law to recover property in that character. It applies only to a suit by a reversioner, remainderman or devisee entitled to property on the death of a female heir. 10 A. 343 = 8 A.W.N. 38.

(2) Applicable to male and female reversioners :—

The article applies to male reversioners, as well as to female reversioners, such as a daughter entitled to come in after a widow, &c. 14 A. 156 (F.B.) = 12 A.W.N. 22 & 22 C. 85 at p. 89 (P.C.) cited in Mitra's Limitation, at p. 1087.

(3) Interposition of several life-estates :—

The article applies to a case in which the reversioner comes after several successive female heirs entitled to life-estates. 23 C. 460.

(4) Case of two co-widows—Cause of action to reversioners :—

Property held jointly by two co-widows devolves, on the death of one of them, on the other; consequently, no cause of action accrues to the reversioners until the death of the survivor, even in respect of a moiety of the property. 23 W.R. 125.

(5) Case of several daughters succeeding :—

Similarly, the law of survivorship prevails in the case of daughters inheriting their father's estate; on the death of one of them, the survivor gets the whole estate, even though, at that time, she be disqualified from inheriting, by reason of her being a childless widow. 23 W.R. 214 (P.C.)

(6) Successive reversioners—One reversioner does not claim from another :—

Where there are several reversioners entitled in succession to succeed to an estate held by a Hindu widow, no one reversioner can be held to derive his title from another, nor will he lose his rights, though the right of the previous reversioner has become barred. 22 A. 38 (84). Cf. 8 O.C. 124,

Scope of article.—(continued).

(7) Position of reversioners :—

(a) "A childless Hindu widow's estate (though a limited estate) is not a particular estate for life. She is more like a tenant-in-tail and the so-called reversionary heirs are more like issue-in-tail. These reversioners have been described as 'reversionary heirs of a deceased Hindu subject to the interest of his widows.' 25 B. 337 (at p. 350) "—Mitra on Limitation at p. 1029.

(b) The position of a Hindu reversioner is the same as that of a remainderman or reversioner entitled to sue under art. 140. He (the Hindu reversioner) has the same privileges as the reversioner under art. 140 has. See Mitra on Limitation bottom of page 1029 and cases noted at p. 1030, *ibid*.

(8) Suit by assignee of reversioner :—

A suit by the assignee of a reversioner, who was out of possession at the date of the assignment, brought within 12 years from the death of the widow, on whose death the reversioner would be entitled to take possession, was held not barred. 8 C.W.N. 535; *Ibid*, 802.

(9) Nature of suit reversioner may bring :—

During the life-time of a widow, the reversioner cannot sue to dispossess her or a purchaser holding under her; he may sue for a declaration that the sale is invalid, as against him, for want of necessity. 6 W.R. 222.

(10) Declaratory suit re reversionary right :—

A person is not entitled to have a mere declaration of right that, upon the death of the widow, he will be the reversionary heir. 2 W.R. 273, Note.

(11) Reversioner's right to recover possession :—

Though a reversionary heir cannot maintain a suit to set aside a sale made by a Hindu widow, if 12 years have elapsed since the date of sale, such limitation will not affect his right to sue after the widow's death, when he succeeds as heir. 2 W.R. 271.

(12) When cause of action for an adopted son arises :—

Limitation does not commence to run against an adopted son until the date of his adoption; and his rights to ancestral property are unaffected by possession of an alienor adverse to the adopting mother. 2 Bom. L.R. 411.

(13) Artificial reversioners :—

The article applies to the case of a person artificially relegated to the position of a reversioner, (*e.g.*) where a settlement record was made out in the name of a widow when there was an adopted son in existence. In such a case, the adopted son will have 12 years from the death of the widow to sue for possession of that property. 8 C.P.L.R. 602; 13 C.P.L.R. 81.

Scope of article.—(concluded).**(14) Suit by reversioner—Adverse possession against last male owner:—**

A widow alienated a portion of her husband's property and afterwards made an adoption. The adopted son died without setting aside the alienation, leaving a widow, who also died subsequently. A suit brought by a reversioner of the adopted son, within twelve years of the death of the widow of the adopted son but beyond 12 years from the alienation by the widow (the adoptive mother), was *held* not governed by this article, because the alienee acquired a prescriptive title by adverse possession as against the adopted son; hence the suit was barred. 32 C. 165. (Current Index, Limitation Act, art. 141).

(15) Adverse possession as between co-sharers:—

Where, out of two co-sharers (sisters) inheriting their father's property, one had been in exclusive possession of a house (all the other properties being in the joint possession of both), and the other co-sharer brought a suit to recover her share in the house more than 12 years of such possession, *held*, the possession of the other co-sharer was not adverse, and the suit not barred, the article applicable being 144 and not this article, and there having been no assertion of plaintiff's title, and no denial of such title by the other co-sharer, within twelve years prior to suit. 3 C.W.N. 774.

(16) Suit by a collateral of a childless male owner:—

Whatever may be the exact scope of this article, it is clearly applicable to the case of a plaintiff (in the Punjab) claiming a childless owner's estate, on the death of his widow, in spite of an alienation by the male owner, at least where twelve years have not elapsed between the said alienation and the male owner's death or that of his widow. 31 P.R. 1892 (F.B.)

Cf. 10 & 116 P.R. 1890.

1.—*On the death of a Hindu or Muhammadan female.*

Whether reversioner is barred if female heir is barred.

(NOTE).—There was no specific provision in Act XIV of 1859 corresponding to the provisions of the present article 141. Suits, therefore, of the description covered by the present article were, when Act XIV of 1859 was in force, governed by S. 1, cl. 12 of that Act, which provided a period of twelve years, *from the accrual of the cause of action*, for suits for recovery of immoveable property or any interest in immoveable property not otherwise specially provided for. Act IX of 1871, for the first time, provided a limitation of twelve years from the death of the widow, for suits by Hindu reversioners.

This state of the law before and after the coming into force of Act IX of 1871 gave rise to the following decisions. In the early stages, it was held that, if a widow representing her husband's estate had been barred, by twelve years' adverse possession in a stranger, from asserting her rights to her husband's property and recovering the same, the reversioner

1.—‘On the death of a Hindu or Muhammadan female.’—(continued).

Whether reversioner is barred if female heir is barred.—(continued).

would be equally barred, because such a suit had to be brought, under S. 1, cl. 12 of Act XIV of 1859, within 12 years from the accrual of the *cause of action*, and the cause of action that accrued to the widow was the cause of action of the reversioners also. Then came Act IX of 1871, under which a reversioner had twelve years from the time the estate fell into possession (art. 141) (*i.e.*) from the death of the widow (art. 142). Articles 140 & 141 of the present Act (1877) are substantially similar to arts. 141 & 142, respectively, of the Act of 1871. In cases that sprang up subsequent to the Acts of 1871 & 1877, the course of decisions changed, it being held that notwithstanding the fact that the widow or other female heir was kept out of possession of her husband's, or the last male owner's, property for more than twelve years, such possession of the stranger could not have the effect of barring the reversioner from recovering the property, because the reversioner's cause of action under the Acts of 1871 & 1877 arises only when the estate falls into possession (*i.e.*) when the female heir dies and he (the reversioner) becomes entitled to *possession*.

There is a yet a third class of cases, *viz.* cases where the widow's rights becoming barred under the Act of 1859, (*i.e.*) before Act IX of 1871 came into force, but the estate falling into possession, (*i.e.*) the widow or the female heir dying, after Act IX of 1871 or Act XV of 1877 came into force. It is held that, in cases of this description, the rights of the reversioner are barred by limitation on the ground that a suit barred under the Act of 1859 could not be revived by the Act of 1871 or that of 1877 (*vide* S. 2 of Act XV of 1877).

The change in the wording of the article has also to be noted:—(1) Whereas article 142 of the Act of 1871 was so framed as to be applicable only to cases of Hindus, the present article has been so framed as to be applicable to Mahomedans also, the words ‘or Muhammadan’ being newly inserted in the present article; (2) Whereas the article in the Act of 1871 contained the words ‘On the death of a Hindu widow,’ in the first column and the words ‘when the widow dies’ in the third column, thereby limiting the scope and applicability of the article only to the cases of reversioners coming in on the death of Hindu widows, the present article contains, instead, the words ‘On the death of a Hindu or Muhammadan female’ in the first column and the words ‘when the female dies’ in the third column, thereby enlarging the scope of the article so as to embrace not only the cases of Muhammadans but also the cases of reversioners entitled to come in on the death of *any female*, be she a widow, a mother or a daughter, entitled to a life-estate in the property of the last male owner, the reason being that there is no difference in character between the estate of a Hindu widow, daughter or mother in the last male owner's property; all are entitled only to a life-estate. Hence the general wording ‘female’ of the present article so as to cover all classes of cases,

1.—'On the death of a Hindu or Muhammadan female.'—(continued).

Whether reversioner is barred if female heir is barred.—(continued).

Thus it will be seen that decisions, before the Act of 1877, bearing on the cases of Hindu reversioners entitled to the last male owner's estate after the death of a widow would be equally applicable to the cases of reversioners claiming such estate on the death of *any* female heir, such as a mother, a daughter or the like.

(N.B.)—(1) The reader will do well to go through the following decisions (which might, otherwise, appear conflicting) in the light of the above remarks.

- (2) The following cases have been arranged, as chronologically as possible and under separate groups in the order of the different judicial tribunals in India, so that the development of the law, bearing on the subject, in the several Provinces in India, may be separately noticed by the reader.

(Calcutta Cases).

(1) Position of Hindu widow :—

A Hindu widow fully represents the estate of her deceased husband. A decree fairly and properly obtained against her will be binding on the reversionary heirs entitled to come in after her. 9 M.I.A. 539—2 W.R. 31 (P.C.)

(2) Widow barred—reversioner barred :—

- (a) Adverse possession barring a Hindu widow, representing her husband's estate, also bars the reversioner. W.R. 1864, 88.
- (b) Where adverse possession, for more than 12 years against a widow, would be a bar to a suit by her for possession of her husband's property, such adverse possession would equally bar such suit by the reversioner after her death, because the widow fully represents her husband's estate during her life-time. 8 W.R. 256.
- (c) Where a Hindu widow alienated her husband's property and her daughter took no steps to set aside such alienation, a suit brought by the daughter's son, within twelve years after the daughter's death but more than twelve years after the widow's death, was barred, since the cause of action accrued on the death of the widow. 4 B.L.R.A.C. 136.
- (d) A decree adverse to the widow, but not obtained by means of fraud or collusion, will bind also the reversioner; similarly, if the widow's rights to recover her husband's property are barred, as when she is kept out of possession, the estate not being allowed to reach her hands, or when, after inheriting it, she is dispossessed by a stranger, such stranger retaining possession for more than 12 years, the reversioner's rights would also be barred. 9 W.R. 505 (F.B.)=B.L.R. Sup. Vol. 1008 [following 2 W.R. 31, (P.C.)=9 M.I.A. 539].

(N.B.)—This case was decided by the Full Bench with reference to S. 1, cl. 12 of the Limitation Act, 1859, their Lordships interpreting the words 'cause of action' in that section as not meaning a *new* cause

1.—‘On the death of a Hindu or Muhammadan female.’—(continued).

Whether reversioner is barred if female heir is barred.—(continued).

(Calcutta Cases).—(continued).

of action accruing to the reversioner personally, but as the cause of action which accrued to the heir or representative, for the time being, of the deceased.

Hence it was that it was decided, in the above case, that, as regards an alienation by a Hindu widow, it is good against her as long as she is alive, because she is competent to make a valid alienation of her life-interest in the estate irrespective of the question of necessity; but, if the estate is held by a stranger adversely to the widow and the estate never reached the hands of the widow, then the cause of action arises at once to the widow, as representing the estate, and she is bound to sue upon it within 12 years: otherwise her claim as well as that of the reversioner would be barred.

(e) This case was followed by 9 W.R. 460; 11 W.R. 9--2 B.L.R. Ap. 14; 11 W.R. 289; Cf. 12 W.R. 234.

(f) The principles of this case were affirmed by the Privy Council in 23 W.R. 214 - 15 B.L.R. 10 - 2 I.A. 113 (P.C.)

(3) Death of female heir affording new cause of action:—

Where the plaintiff's mother, who was then the next reversioner of a Hindu widow, allowed more than twelve years to elapse without questioning acts of waste and alienations made by the widow, a suit by the plaintiff questioning such acts and alienations was held barred; but, if, at the death of the alienating widow, the plaintiff should be a reversioner entitled to possession, the death of the widow would give rise to a new cause of action in plaintiff's favour and he might sue thereon. 15 W. R. 1.

(4) Act XIV of 1859 compared with later Acts:—

(a) Under the Act of 1859, a reversioner would be barred, if the person entitled to the inheritance, (e.g.) a female heir, after whom he (the reversioner) had to take, had been kept out of possession for more than 12 years. 5 C. 988; 9 W.R. 505--B.L.R. Sup. Vol. 1008.

(b) But, under the Acts of 1871 and 1877, the reversioner may sue within 12 years from the time his estate falls into possession (i.e.) when the female heir dies. 9 C. 934 (F.B.) = 13 C. L.R. 372; see also 23 C. 460, which holds that the old law, which barred the widow barred also the reversioner, has undergone a change under this article of the present Act and art. 142 of Act IX of 1871. If, however, the right of the female heir had been barred before Act IX of 1871 came into force, the right of the reversioner would also be barred. 9 C. 934 (935) = 13 C.L.R. 372 (F.B.) & 26 C. 285.

(c) If a widow herself had been kept out of possession for more than 12 years, before Act IX of 1871 came into force, by adverse possession on the part of a stranger to the inheritance, the reversioner would also be barred. 23 C. 942 (P.C.)

1.—'On the death of a Hindu or Muhammadan female.'—(continued).**Whether reversioner is barred if female heir is barred.**—(continued).

(Calcutta Cases).—(concluded).

(d) Before Act IX of 1871 came into force, adverse possession barring the widow barred also the reversioner and the latter had no fresh cause of action on the death of the female heir; and the cause of action, if any, barred under the Act of 1859 cannot be revived by the later Acts. 2 C. W.N. 102.

(e) In a case where the widow was dispossessed in 1864, and the reversioner sued after the present Act came into force and within 12 years from the death of the widow, which event occurred in 1867, it was held that, although more than 12 years had elapsed since the widow's dispossession, the new Act gave the reversioner a fresh period of limitation from the death of the widow and the suit was in time. 12 C.L.R. 548.

(NOTE).—This was a case in which the female heir's right had not been barred when Act IX of 1871 came into force.

Compare 9 C. 984 (F.B.) & 26 C. 285.

(f) Where a Hindu mother succeeds as heir of her son and her right to sue for the property is barred by reason of adverse possession, the next heirs of her son will have 12 years from *her* death for recovery of possession, because their cause of action, under the present law, arises only at her death, owing to the alteration in the law effected by art. 140. 11 C. 791 [following 9 C. 984 (F.B.)].

(g) If the right of the female heir to recover property, she was entitled to succeed to, had been barred before Act IX of 1871 came into force, the reversioner's right would also be barred, notwithstanding the fact that the female heir died within 12 years prior to the reversioner's suit; this is because S. 2 of the present Act would not revive a right to sue barred before Act IX of 1871 came into force. 26 C. 285 [following 9 C. 984 (F.B.)]; 9 W.R. 505 = B.L.R. Sup. Vol. 1008; 23 W.R. 214 = 15 B.L.R. 10 (P.C.) & 14 C. 323 (344)].

(Allahabad Cases).

(1) Widow barred—reversioner barred:—

If, on the death of the last male owner, a person, setting himself up as the adopted son of the last male owner, takes possession of the estate and continues to be in possession, adversely to the widow for more than 12 years, the widow as well as the reversioners would be barred. 10 A. 485 = 8 A.W.N. 192 (referring to 9 M.I.A. 543).

(2) Widow kept out of possession for more than 12 years:—

Under this article, a reversioner is entitled to sue for possession of the last male owner's estate, within 12 years from the death of the widow or other female heir, although the female heir, after whom he (reversioner) is entitled to come in; had been kept out of possession for more than 12 years. 14 A. 156 (F.B.); 25 A. 435 & 28 A. 448 [following 28 B. 725, (P.C.), and explaining and distinguishing 22 C. 445 (P.C.)].

1.—‘On the death of a Hindu or Muhammadan female.’—(continued).

Whether reversioner is barred if female heir is barred.—(continued).

(Allahabad Cases).—(concluded).

(3) Female heir barred—reversioner barred :—

If a stranger trespasses upon property in the possession of a female heir entitled to a life-estate and holds it adversely to such female heir for more than 12 years, the female heir as well as the reversioners would be barred. 20 A. 42 = 17 A.W.N. 195.

(Bombay Cases).

(1) Adverse possession against widow—Right of subsequently adopted son :—

Where property was held adversely to a widow for more than 12 years, a suit by a subsequently adopted son of such widow to recover possession of the property was barred. 13 B. 276.

(2) Female heir barred—reversioner barred :—

Where, for more than 12 years during the lifetime of a Hindu widow, her husband's property was in the possession of her husband's mother and her allies adversely to the widow, a suit brought by the reversioner, after the widow's death, to recover possession of the property was barred. 14 B. 317.

(3) Widow kept out of possession for more than 12 years :—

Where a bequest to *dharma* by the last male owner was void, a suit by the reversionary heir of the owner to recover possession of the property as undisposed-of residue *held* to be in time, because brought within 12 years from the death of the last surviving widow of the owner, notwithstanding the fact that trustees for the *dharma* were in possession for more than 12 years adversely to the widows. 14 B. 482. On appeal 21 B. 646; before Privy Council, 23 B. 725 = 26 I.A. 71 (P.C.) = 3 C.W.N. 621 = 1 Bom. L.R. 607.

(N.B).—The reasoning of the decision of the Privy Council was that the reversioner does not claim from or through the widow but in his own right as the heir of the last male owner and his cause of action arises only after the female heir's death.

(4) Adverse possession against widow for more than 12 years :—

A reversioner may sue to recover property to which he may be entitled after the death of a female heir, within 12 years of the latter's death, even though the same might have been held by a stranger adversely to the female heir for more than 12 years. 2 Bom. L.R. 106 (following 23 B. 725 = 26 I.A. 71 = 1 Bom. L.R. 607 & dissenting from 19 M. 512).

(Madras Cases).

1) Widow barred before Act IX of 1871 :—

(a) If the widow's right to possession had been barred before Act IX of 1871 came into force, the reversioners would also be barred, because the later Acts, IX of 1871 & XV of 1877, could not revive a right to sue barred under Act XIV of 1859. Compare 12 M. 26 = 15 I.A. 167 (P.C.)

1.—'On the death of a Hindu or Muhammadan female.'—(concluded).

Whether reversioner is barred if female heir is barred.—(concluded).

(Madras Cases).—(concluded).

- (b) Where plaintiff's maternal grandfather died in 1845, and one of his daughters alienated the property and the alienee was in possession for more than 12 years before Act IX of 1871 came into force, the other daughter (i.e. the plaintiff's mother) not having taken any steps to recover the same, a suit by the plaintiff, brought within 12 years after his mother's death, but more than 12 years from the date of the original alienation, was held barred, because his mother, who represented the inheritance, had been barred by 12 years' adverse possession before Act IX of 1871 came into force. 1. M.L.J. 392.

(NOTE).—(1) This was a decision reversing, on review, 13 M. 512, which had held that the suit was not barred.

- (2) This practically overrules 5 M.H.C. 428; 5 M.H.C. 428 has also been overruled by B.L.R. Sup. Vol. 1008—9 W.R. 505 (F.B.); & 28 W.R. 214=15 B.L.R. 10=2 I.A. 113 (P.C.).

(2) Contrast between Act XIV of 1859 and the later Acts:—

In a case where the last male owner died after the present Act (XV of 1877) came into force and his daughter had been kept out of possession by a trespasser from the last male owner's death, a suit by the reversioner after the daughter, brought within 12 years from the daughter's death, but beyond 12 years from the last male owner's death, was held to be in time; because this was a case in which the female heir's right had not been barred before Act IX of 1871 came into force. 20 M. 493=7 M.L.J. 204 [*distinguishing* 22 C. 445 (P.C.)]

(Punjab Cases).

(1) Adverse possession against female heir not adverse to reversioner:—

Even if adverse possession had been taken against the female heir for more than twelve years, the reversioner would not be barred if he sued within twelve years from the death of the female heir. 43 P.R. 1901; 41 P.R. 1903.

(2) Adverse possession against widow not adverse to reversioner:—

Even though the adverse possession had begun during the life-time of the widow, a suit by a reversioner for possession of immoveable property, brought within twelve years from the date of the widow's death, but more than twelve years from the commencement of such adverse possession, was held not barred as the reversioner's cause of action accrued on the death of the widow. 79 P.R. 1898. (following 21 B. 646).

Compare case No. 8 under the Heading, Bombay Cases, *supra*.

2.—'When the female dies.'

(1) When limitation begins to run against reversioners :—

As against reversioners, limitation runs from the death of the widow or the immediate female heirs of the deceased owner. 17 W.R. 237.

(2) When the reversioners can come in :—

(a) The reversioners would be entitled to come in, whether the Hindu widow dies a natural death or renounces the world and becomes a *bairagini*, the result in both cases being the same. 10 C. 1102 at p. 1108 ; 22 C. 354 (361).

(b) The article is not applicable to the case of a person suing on the very same cause of action which accrued to a female and suing by right of being her heir. 12 C. 594.

(3) Mahomedan heiress barred—Her heirs barred :—

A Mahomedan heiress having died more than twelve years after the succession opened in her favour without suing for her share of inheritance, a suit by her heir claiming the same property was held barred. 12 C. 594.

(4) Effect of failure to sue under s. 283, C.P.Code :—

(a) Under this article, a reversioner's right to sue accrues on the death of the widow. The fact that the reversioner, having failed in an application for possession in execution-proceedings against the widow, did not sue under s. 283, C.P.Code, does not debar him from filing a regular suit. 20 B. 801.

(b) So, also, where the widow makes an adoption after the husband's death. The adoption will not necessitate the reversioner to bring a suit at once. He may bring his suit after the widow's death. 21 B. 376.

A.—Cases of alienations.

(Calcutta Cases).

(1) Cause of action in case of alienation by widow :—

In the case of an alienation by a widow, the cause of action to a reversioner does not arise on the date of the alienation but on the date on which the plaintiff-reversioner becomes entitled to the reversion. 6 W.R. 222.

(2) Suit to set aside alienation by widow :—

A suit by a reversionary heir to set aside alienations made by a Hindu widow may be brought within twelve years from the death of the widow. 7 W.R. 450.

(3) Female heir's alienation different from trespass against her :—

(a) In the case of an invalid alienation made by a Hindu widow, the possession of the alienee would not be adverse to the reversioner until the widow's death, even when Act XIV of 1859 was in force: the cause of action for the reversioner would, in such a case, arise only after the female heir's death. 8 C. 442. (This is an exception to the general proposition—adverse possession against a female heir barred also the reversioner—laid down in 9 W.R. 505 (F.B.) = B.L.R. Sup. Vol. 1008.

2.—‘When the female dies.’—(continued).

A.—Cases of alienations.—(continued).

(Calcutta Cases).—(continued).

- (b) Compare 9 C. 98, which was also a case of an invalid alienation by a female heir, in which the same decision was arrived at.
- (4) **Reversioner's suit questioning alienation :—**
A suit by a reversioner, brought within 12 years from the death of a widow questioning the alienations made by her, was not barred. 10 W.R. 276 ; 11 W.R. 184.
- (5) **Compromise by widow binding on reversioner :—**
(a) A widow, as representing the entire estate of her husband, can enter into a compromise, so as to bind the estate ; a minor widow, if properly represented, stands on the same footing as if she were of age. 3 B.L.R. A.C. 437 = 12 W.R. 413.
(b) A compromise entered into by a Hindu widow, in relation to her deceased husband's property, is tantamount to an alienation by her, so that the possession of the person claiming under the compromise is not adverse to the reversioner. His cause of action for the recovery of the property arises only on the death of the widow. 10 C.L.R. 337.
(c) An alienation by a Hindu widow of her husband's estate with the concurrence of the then next reversioner will bind the reversioners in existence at her death. 10 C. 1102.
- (6) **Alienation by one of two daughters—Reversioner's cause of action :—**
Where the two daughters of a Hindu succeeded to his estate and one of them alienated a part thereof, a suit brought by the reversionary heir more than 12 years after the death of the alienor, but less than 12 years after the death of the surviving daughter, was barred, since the cause of action accrued to the reversioner from the death of the alienor. 3 B.L.R.A.C. 208 = 12 W.R. 97.
- (7) **Alienation by widow not adverse to reversioner :—**
(a) Where a Hindu widow executed an *ekrar*, transferring a share of her husband's property to her grand-daughter, the possession of the property by the grand-daughter, during the widow's life-time, was not adverse to the reversionary heir. 12 W.R. 334 ; on review, 13 W.R. 52 = 5 B.L.R. 585.
(b) Where possession is obtained by a third party, not against the will of the female heir but by means of an alienation by her or in collusion with her, such third person's possession will not be adverse to the reversioners. 23 C. 460 (following 9 W.R. 505 = B.L.R. Sup. Vol. 1005).
- (8) **Validity of widow's alienation for paying barred debts :—**
The alienation by a Hindu widow of her husband's property for paying his debts barred by limitation, is valid as against the reversioners. 21 C. 190.

2.—‘When the female dies.’—(continued).

A.—Cases of alienations—(continued).

(Calcutta Cases).—(concluded).

(9) Effect of decree adverse to female heir :—

The dismissal of a Hindu daughter's claim as heiress to a share in a certain property, will bind the reversioner (in this case her son) after her.

Held, also, that this article fixing the date of the female heir's decease as the starting point of limitation, did not alter the existing law as to the effect of a decree adverse to the predecessor as representing the estate, nor did it give a new starting point to the successor nor did art. 142. 21 C. 8 (P.C.)—20 I.A. 188 (following 9 M.I.A. 589.)

(Allahabad Cases).

(1) Alienation by female heir :—

If a female heir in possession of a life-estate alienates the property in her possession, the alienee's possession will not be adverse to the reversioner's until the death of the female heir because his cause of action accrues only at the death of the female heir, or of the last of such heirs, if there are more such heirs than one. 19 A. 357.

(2) Decree against widow binding on reversioner :—

A reversioner, succeeding to the estate of a deceased person after the death of the latter's widow, would be bound by a decree obtained against the widow in a suit brought by her for the estate of her husband, in the absence of some special ground to impeach the decree and the widow's right to sue would devolve on the heir of her husband entitled to the estate. 20 A. 341.

(3) Daughter's right accruing only after death of all widows :

If a male owner dies leaving two widows and a daughter, the latter's right to possession of her father's estate arises, for the first time, only after the death of both the widows. Her suit, therefore, to recover her father's property, though brought more than 12 years from the date of the alienation thereof, would be in time, if it is within twelve years of the death of the last surviving widow. A.W.N. (1905), 68 (following 25 A. 435). Current Index, under Heading ‘Limitation Act,’ art. 141.

(Bombay Cases).

(1) Effect of Court-sale against widow and reversioners :—

Where a Court-sale and possession thereunder had the effect of setting up an adverse title as against the reversionary heir, the latter ought to bring a declaratory suit, even though the widow were alive; and if he fails to do so, his right to the property would be barred even after the widow's death. 14 B. 512 (515).

(2) Partition between co-widows—Possession of alienee from one of the widows :

Where a Hindu died leaving two widows and a daughter and the widows having divided the property of their husband among them, one of

2.—When the female dies.—(continued).**A.—Cases of alienations.—(concluded).****(Bombay Cases).—(concluded).**

them sold her share, the possession of the purchaser and his representatives did not become adverse to the daughter till the death of both the widows. 18 B. 216.

(Punjab Cases).**(1) Suit to recover property alienated by widow :—**

A suit by a reversioner for possession of immoveable property in the hands of the alienee from the widow of the last male owner, brought more than twelve years from the date of sale, but within twelve years from the widow's death, was not barred by limitation, as the cause of action accrued only from the date of the widow's death. 15 P.R. 1882.

(2) Suit by reversioner to recover occupancy tenure :—

This article is applicable to a suit by a reversioner to recover an occupancy tenure, on the death of a widow, from the defendant, a vendee from the widow. 14 P.R. 1882.

(3) Suit to contest alienation by widow :—

A suit by a reversioner to contest an alienation made by a Hindu widow, when in possession of her husband's property, in her capacity as Hindu widow, is governed by this article and not by article 144. 110 P.R. 1892.

(4) Reversioner's suit during life of widow :—

Where a widow had alienated her husband's estate to the defendant and had subsequently surrendered her life-estate in favor of the reversioner, a suit by the reversioner for possession of immoveable property in the hands of the alienee will not lie during the life-time of the widow, as his cause of action for such a suit would arise only after the widow's death. 43 P.R. 1899.

(5) Suit for possession from an alienee from female heir :—

A suit by a reversioner for possession of immoveable property, after the widow's death, from the defendant, who sets up a mortgage from the widow, is governed not by art. 91 but by this article, the cause of action arising from the date of the widow's death. 84 P.R. 1902.

(6) Reversioner's suit for possession—Gift by sonless proprietor :—

Where a gift of ancestral land by a sonless proprietor in the Punjab has not been set aside by a suit brought within the shorter period of limitation prescribed for such suit, a suit by his reversioners for possession is maintainable at any time within 12 years after the death of the donor. 93 P.L.R. 1908 = 56 P.R. 1908,

2.—'When the female dies.'—(continued).

B.—Cases of permissive possession.

Suit by reversioner for possession :—

- (a) Where it was found that the daughter's possession was not adverse to the widow, a suit by a reversioner for possession of immoveable property, brought more than twelve years from the date of such possession, but less than twelve years from the date of the widow's death, was not time-barred. 74 P.R. 1895.
- (b) Where a widow's brother holds possession of her husband's estate, such possession will be presumed to be permissive, in the absence of proof to the contrary, and a suit by a reversioner for possession of the estate, brought more than twelve years from the date of such possession but less than twelve years from the widow's death, was within time. 53 P.R. 1900.
- (c) Where, owing to her inability to pay kists due by her in respect of her husband's estate, a Hindu widow abandoned her husband's estate, and, in consequence of the reversioner declining to take possession thereof, the Revenue authorities permitted the defendant to be in possession thereof on payment of kists due therefor, the possession of the defendant was not adverse as against the reversioner. 43 P.R. 1901.

C.—Suits involving the setting aside of deeds.

(1) Reversioner's suit during female heir's life :—

A suit brought by the next reversioner to set aside deeds executed by a widow, whereby she alienated her husband's property, brought, during her life-time, more than twelve years after the execution thereof, was barred. Nor would a suit lie during the widow's life for recovery of possession and declaration of the reversioner's right. 10 W.R. 30.

(2) Object of suit, cancellation of instrument :—

If the object of a suit by the reversioner be the setting aside of a deed executed by the last male owner and set up against him, it should be brought within three years from the death of the widow under art. 91, though the prayer in the suit is recovery of possession consequent on the widow's death. 19 C. 629.

(3) Lease by Hindu widow :—

A——is on her death voidable, and not void of itself. A suit by a reversioner, on her death, for recovery of possession of immoveable property by setting aside such a lease, is governed by art. 91 and not by this article. 30 C. 990=7 C.W.N. 864 (*distinguishing* 24 C. 77); because the reversioner might elect to treat the lease as valid. 25 C. 1 (P.C.).

(4) Suit involving the setting aside of an alienation :—

A suit by a reversioner, after a widow's death, to recover possession of property belonging to the last male owner and alienated by his widow is governed by this article and not by art. 91, if the alienation were not for a legal necessity, because in such a case the alienation is not binding on the reversioner and there is no necessity to set it aside. 9 C.W.N. 696.

2.—‘When the female dies.’—(continued).

D.—Suits involving questions of validity of adoption.

(1) Suit involving validity of adoption:—

(a) The cause of action for a suit by the reversionary heir to recover possession of the property belonging to the previous owner accrues only on the death of the widow of such owner, even though such widow might have professed to adopt a son, provided the reversioner contests the adoption. 4 B.L.R. 3- 12 W.R. 14 (F.B.).

(b) This article is applicable to a suit by a Hindu reversioner for possession of immoveable property, even though the question of the validity of an adoption arises in it for decision. 8 A. 644 = 6 A.W.N. 292.

Compare 17 A. 167 = 15 A.W.N. 36.

(2) Suit for possession and declaration of invalidity of adoption:—

(a) A suit for possession of immoveable property and for a declaration that an adoption was invalid, brought more than 6 years after the plaintiffs were aware of the adoption, was not governed by this article, and was barred by limitation, it being governed by art. 118. 10 A.W.N. 241.

(b) Though a suit for a declaration, that an adoption by a widow to her husband is invalid, should be brought within the period provided by art. 118, still a suit for possession by the reversioner would be in time if brought within 12 years from the date of the widow's death or when the estate fell into possession. 14 C. 401.

13 C. 308 = 13 J.A. 84 (P.C.) distinguished on the ground that that was a case with reference to art. 129 of Act IX of 1871, that, in that case, the cause of action had arisen under Act IX of 1871, and that, before the completion of the title by 12 years' adverse possession, the Act of 1877 came into force.

(c) A suit by a reversioner for possession of landed property on the death of a Hindu widow, is governed by this article notwithstanding the fact that it involves the decision of a question relating to the validity of an adoption and the genuineness and the validity of a deed of *anumathipatra* and the suit is brought beyond the 6 years provided by art 118. 9 C. W.N. 222 (following 4 C.W.N. 406 = 27 C. 242). Current Index, under Heading ‘Limitation Act,’ art. 141.

(d) This article does not apply to a suit where the plaintiff cannot succeed without impugning or establishing an adoption. If, therefore, a suit for declaring an adoption, under which the defendant claims, were barred by limitation under art. 118 or art. 119, the suit by the reversioner would be barred. 26 M. 291 (F.B.) = 13 M.L.J. 27 (BHABHYAM AYENGAR, J. dissenting).

(e) A reversioner is not bound to file a suit during the life-time of a widow for a declaration that an adoption made by her was invalid; his cause of action arises only on the death of the widow and, for the recovery of immoveable property, he has 12 years from the date of her death within which to sue. 21 B. 376.

2.—'When the female dies.'—(continued).

D.—Suits involving questions of validity of adoption.—(concluded).

- (f) If a plaintiff can succeed as reversioner without disputing the validity of the defendant's adoption, he has 12 years for so doing under this article; but if he must set aside the adoption before he can succeed, then he has six years from the date of his knowledge of such adoption. 24 B. 260.
- (g) Where the defendant had all along asserted his adoption to the knowledge of the reversionary heir, a suit by the latter to recover possession of immoveable property was governed by art. 118 and not by this article, even though the suit was instituted after the widow's death. 25 B. 26.
- (h) A suit for possession of immoveable property against an alleged adopted son instituted more than 6 years after the alleged adoption but less than 12 years from the date of the estate falling into possession, was governed by this article and was within time. 55 P.R. 1897.
- (i) Held, that a suit by a reversioner to recover possession of immoveable property in the hands of a defendant under an alleged adoption, was barred when not brought within the period prescribed in article 118. 71 P.R. 1901.
- (j) A suit by a reversioner for possession of immoveable property brought within 12 years from the date of the death of the widow but more than six years from the date of the defendant's alleged adoption, was governed by this article and was not barred by limitation. 3 C.P.L.R. 32.

E.—Relinquishment by widow.

(1) Powers of Hindu widow—Relinquishment:—

- (a) A Hindu widow can accelerate the succession of the reversionary heir by conveying absolutely her life-estate to him; in that case, it is essential that she should surrender the whole estate so that the reversioner may step in at once. 19 C. 236 = 19 I.A. 30 (P.C.).
- (b) It is competent for a Hindu widow to convey to the next reversioner or to a third party, with the consent of the next reversioner, the whole or any portion of the estate and the transferee will acquire an absolute interest. But she cannot, with the consent of the presumptive reversioner, convert her interest in any portion of her husband's estate retained by her into an absolute interest freed from all restraint on alienation. 22 C. 354.
- (c) A widow cannot, by any act or declaration of her own, while retaining possession of her husband's estate, give her possession or estate a character different from that attaching to the possession or estate of a Hindu widow. Her possession as such can never be considered adverse to the reversioner. 23 C. 460.

(2) Relinquishment by widow to next reversioner:—

In the case of property relinquished by a Hindu widow in favour of the then next reversioner, the cause of action for a suit by her husband's other heirs arose on the day on which such next reversioner got possession of the property. 6 W.R. 180.

2.—‘When the female dies.’—(concluded).

F.—Possession of female heir not as such.

(1) Possession of widow not as a widow :—

- (a) This article would not apply if the female had been in possession not as a widow but only as a trespasser. 17 M. 34 (37), cited in Mitra's limitation at p. 1040.
- (b) This article would not apply, where the widow does not enjoy her husband's estate in her capacity as a Hindu widow but enjoys it in lieu of maintenance made by her deceased husband under a will. Compare 4 M. 124.
- (c) Where, in an undivided Hindu family governed by the Mitakshara, widows entitled only to maintenance take possession of the estate and dispose of it to strangers and the possession of the widows and the strangers covers a period of more than 12 years, a suit by the reversioners, after the lapse of 12 years from the date of the widow's taking possession, would be barred, unless such possession was under an arrangement with the reversioners. 29 C. 664 (P.C.) = 6 C.W.N. 657.
- (d) If a Hindu widow, under whom the defendants claim, had got property from another Hindu widow, (e.g), the widow of the first named widow's husband's brother, and been in possession for more than 12 years after the latter's widow's death, her possession would be adverse to the reversioners entitled to come in after the latter widow, because the former widow did not obtain the property as a Hindu widow but in a different capacity and because her interest would not, in such a case, be a mere life-interest. To such a case, this article would not apply. 23 C. 942 (P.C.)
- (e) Where, in the case of a son, who survived his father, the mother of the son took all the property after his death as against his (son's) widow and retained the same in her possession for more than 12 years as against the son's widow, the son's widow and the reversioners entitled to come in after her death were held to be barred; because the possession of the mother-in-law was not that of a Hindu widow as such but as a trespasser and such adverse possession had been completed before Act IX of 1871 came into force. 22 C. 445 = 22 I.A. 25 (P.C.) = 5 M.L.J. 269.

(2) Arrangement between mother-in-law and daughter-in-law :—

Where, by an arrangement between a Hindu mother-in-law and daughter-in-law (the former's husband having predeceased the latter's), the former having been allowed to enjoy certain properties belonging to the latter's husband's estate, enjoyed it for more than 12 years, alienated it and died, a suit by the latter, to recover the property brought within 12 years from the mother-in-law's death was held to be in time. 20 M. 459.

(General.)

(1) Hindu widow having a French Indian domicile :—

A Hindu widow having a French Indian domicile at Pondichery has an absolute right by inheritance to her deceased husband's estate. Her interest is not limited to a mere life-interest as in British India. 24 M. 650.

(2) Jain widow's right to her husband's property :—

A childless Jain widow acquires an absolute right in her husband's separate property. 27 C. 379. Art. 141 would not apply to such property. Mitra's Limitation, p. 1084.

(3) Relinquishment by a Mahomedan in his mother's favor :—

Where a Mahomedan relinquished his share in his father's property in favour of his mother, the latter took an absolute interest in the property and not merely a life-interest. 17 W.R. 525 (P.C.).

(4) Date of death of widow—Burden of proof :—

A reversioner suing for recovery of the last male owner's estate, on the death of a widow, must prove affirmatively that the widow had died and that the death took place at some time within 12 years prior to suit. 14 M.L.J. 404.

(5) Effect of reversioner's continuing suit by widow :—

Where, on the death of a Hindu widow, the reversionary heir continued a suit instituted by her to set aside an *ekrar* executed by her, transferring a share of her husband's property, such act on the part of the reversionary heir did not preclude him from afterwards suing to recover possession of the share as reversioner. 12 W.R. 334.

(6) Succession of life-estates :—

(a) There cannot be a perpetual succession of life-estates under the Hindu law—
See Mitra on Limitation, at p. 1031, citing 23 M. 271 (P.C.)

(b) Nor can there be such perpetual succession of life-estates under the Mahomedan law—Ibid, citing 17 B. 1 (at p. 5) & 27 B. 500 (at p. 514).

(7) Reversioners of husband representatives of widow :—

The reversioners of her deceased husband are, for purposes of S. 365, C.P. Code, the legal representatives of a Hindu heiress suing for her husband's estate and dying after the institution of the suit. 23 C. 636.

142.—For possession⁽¹⁾ of immove- *Twelve years.* The date of the dis-
able property⁽²⁾, when the possession or dis-
plaintiff, while in possession continuance⁽³⁾,
of the property, has been
dispossessed or has discon-
tinued the possession.

(Notes)

Scope of article.

(1) Articles 142 and 144 contrasted—Burden of proof:—

- (a) Article 144 would apply where there is no other article specifically applying to a case. If a claim comes within the terms of article 142, the defendant will, by proving that the plaintiff, while in possession, was dispossessed, or discontinued possession, be entitled to succeed. He need not prove that his (defendant's) possession was adverse, as he would have to show in a case falling under article 144. 17 C. 137 (P.C.) = 16 I.A. 148 = 23 P.R. 1890.

EXAMPLE:—

On the plaintiff's ancestors refusing, at the regular settlement in 1843, to engage for the revenue of certain lands, the Government assessed the lands and entered into an engagement with the defendant for the revenue. Since then, the plaintiff was not in any manner of possession, but the defendant was in possession. Held, in a suit by the plaintiffs more than twelve years from their discontinuance of possession, the defendants need not prove adverse possession on their part and the plaintiffs must fail. *Ibid.*

- (b) Where the plaintiffs sue for possession, alleging dispossession within 12 years prior to suit, this article would apply, and plaintiff will have to prove possession and dispossession within 12 years prior to suit. If the defendants allege wrongful or adverse possession, the case would fall under art. 144 and defendant will have to prove adverse possession for over 12 years. L.B.R. (1903), 56.
- (c) In all suits for ejectment, plaintiff has to prove that his title has not been barred by limitation. In suits governed by art. 142, plaintiff has to show that his claim is within time; whereas, under art. 144, defendant has to prove that plaintiff's claim has been barred by time. L.B.R. (1893-1900), 360.
- (d) In cases governed by art. 142, plaintiff has to show that he has a subsisting title and his claim is not barred. Whereas, in cases falling within art. 144, defendant has to show that plaintiff's claim is barred by limitation. 2 U.B.R. (1897-1901), 461.
- (e) In cases falling under art. 142, the plaintiff must, at the outset, show possession within 12 years and cannot rest merely on a proof of title; while, in cases falling under art. 144, the plaintiff may rest content with proof of title only in the first instance and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than 12 years before suit. 14 B. 458.
- (f) Art. 143, Act IX of 1871 (=art. 142 of the present Act) only required that the plea should aver a dispossession or discontinuance of possession 12 years before suit and the plea was not answered by a replication that

Scope of article—(continued).

the plaintiff could not have recovered immediate possession, in a case where the discontinuance of possession or dispossession of the plaintiff afforded ground for an action to protect his title. 41 P.R. 1881.

EXAMPLE :—

Where, at the time of the regular settlement, the proprietor of certain land asserted no proprietary rights to the land, though called upon to do so, and the Government settled the land as *khana khali* estate with a farmer, ignoring the proprietor's title, time began to run, for a suit to recover proprietary possession of the land, from the time when the farmer was put into possession under the lease. But, if at that time, the proprietor asserted his title and it was formally recognised but, in consequence of his refusal to engage for the revenue, he was excluded from the enjoyment of his estate, which was transferred to a farmer for a definite period, limitation did not run against the proprietor, and a suit brought at the expiry of such term was not barred. 41 P.R. 1881.

(2) Suit for accounts of profits of a water-course :—

A suit for an account of the income and expenditure of a certain *kul* (water-course) jointly excavated by the parties, being a suit relating to profits of immoveable property, was governed by 12 years' limitation either under this article or art. 144. 51 P.R. 1898.

(3) Suit to set aside mortgage and for possession :—

The article is applicable to a suit to set aside a mortgage by a conditional sale of certain immoveable property made on plaintiff's behalf during his minority and for possession of the property. 3 A.W.N. 64; 8 A.W.N. 256.

(4) Adverse possession—Landlord and tenant :—

During the subsistence of a tenancy, the assertion of a title by the tenant does not render his possession adverse. Such assertion after the determination of his tenancy or his attorning and paying rent to a stranger, who asserts title, makes the possession adverse, provided the owner has knowledge of the facts. 8 M.L.J. 92.

(5) Sale by a Buddhist co-heir :—

Where land, belonging to several co-heirs governed by the Buddhist law, is sold by the eldest co-heir and the other co-heirs sue to recover their shares, the suit will be governed by this article. * 3 L.B.R. 7.

(6) Extinguishment of title :—

If a person is, when labouring under minority or any other disability mentioned in S. 7 of the Limitation Act, is dispossessed or discontinues possession, he will have only 3 years from the date of the cessation of the disability to sue to recover the property. If he does not do so, his right would be extinguished and the disposessor would have a perfected title by adverse possession; his suit to recover possession will be governed by this article or art. 144. 5 C.W.N. 545 (P.C.) = 24 M. 387; 3 Bom. L.R. 308 = 28 I.A. 81.

Scope of article.—(continued).

A.—Suits falling within the article.

(1) Suit involving setting aside of a deed :—

A suit to recover property by setting aside a document, which does not require to be set aside on the ground of its being a nullity, is governed by this article, and not by art. 91. 30 C. 493 (23 C. 460, 12 C. 69).

(2) Suit for land abandoned :—

(a) As a person does not, by the mere act of abandonment, lose his proprietary right in his lands, a suit brought by him to recover possession of the lands within 12 years of such abandonment, was not barred. 85 P.R. 1892 (F.B.).

(b) A suit for possession of land abandoned is governed by this article, the limitation being reckoned from the date upon which the discontinuance began. 109 P.R. 1892.

(3) Alienation by sonless proprietor (Punjab) :—

(a) Where a sonless proprietor sold lands, a suit by his heirs to recover their shares in the lands sold, brought within 12 years after delivery of possession to the vendee, though more than 6 years after the sale, was not barred by limitation. 54 P.R. 1891.

(b) But, where the heir had full knowledge of the alienation made by a sonless proprietor, the death of the latter gave no new cause of action in favour of the former. 10 P.R. 1890.

(4) Suit for management of religious institution :—

Where the management of a public religious institution devolves by rotation on the senior branch of the hereditary trustees for more than twelve years, to the exclusion of the members of the junior branch, the right of the members of the junior branch would become extinguished, whether article 127 or article 124 or this article is applicable to the case; it is immaterial that no member of the senior branch was in continuous possession for twelve years. 18 M.L.J. 341 = 27 M. 192.

(5) Suit for possession—Mortgage by guardian :—

A suit by a minor on attaining majority, to set aside a mortgage by conditional sale of certain immoveable property made by his guardian on his behalf and for possession, is governed not by art 91, but by this article. 5 A. 430 = 8 A.W.N. 647.

(6) When possession is not adverse :—

Where a piece of vacant land in a town was used by plaintiff's brother as a backyard, such user did not constitute adverse possession. Plaintiff's suit within 12 years of the defendants trying to build on the land and denying plaintiff's title, was held to be in time, 21 M. 58,

Scope of article.—(continued).

B.—Suits not falling within the article.

(1) No allegation of possession and dispossession :—

This article would not apply to a suit for possession wherein there is no allegation that the plaintiff was ever in possession of the property. L.B.R. (1908), 184.

(2) Suit involving question of adoption :—

A gift, by an adoptive mother, of property belonging to the adopted son is an interference with the latter's right. A suit by him, therefore, for recovery of the property, avoiding the gift, is governed not by this article, but by art. 119. 13 M.L.J. 144.

(3) Suit by assignee from reversioner :—

A suit by an assignee from a Hindu reversioner, the latter being out of possession at the date of the assignment, will be in time if brought within 12 years from the death of the female heir, after whom the reversioner would be entitled to succeed. Such a suit is not governed by this article but by arts. 136 and 141 read together. 8 C.W.N. 535.

(4) Suit for share in joint family property :—

A suit to recover a certain share in joint family property, by a person excluded therefrom, is governed by article 127, and not by this article; and the onus lies on the defendant to show that the exclusion became known to the plaintiff more than twelve years before the suit. 1 C.W.N. 543.

(5) Suit by a devisee :—

Where a suit was instituted for recovery of the plaintiff's share in certain property under a will executed by the deceased owner thereof and the plaintiff personally never had any possession over the property in suit, this article held not to apply to the suit. 86 P.L.R. 1902.

(6) Suit involving setting aside of award :—

As long as there is an award in existence valid until set aside, a suit for recovery of property affected by the award will be barred by limitation if brought after the period of limitation fixed for setting the award aside. U.B.R. (1892-93), 475.

(7) Suit for possession on allegation of trust :—

Where, in a suit for possession on the allegation that the plaintiff had entrusted certain land to defendant, on condition of re-delivery on demand, it was found that the plaintiff was never in possession and there was no entrustment, a suit for recovery of possession was held governed by art. 144. 97 P.R. 1890.

(8) Suit for dispossession of an assign :—

A suit for dispossession of an assign of a third person is not a suit for possession within the meaning of this article or art. 144, but rather fell within art. 120. 8 P.R. 1899.

Scope of article.—(concluded).**B.—Suits not falling within the article.—(concluded).****(9) Suit for possession, dispossession occurring during farm :—**

A suit for possession of lands, the plaintiff being dispossessed therefrom during the continuance of a farm, is governed by art. 144 and not by this article, the cause of action accruing at the determination of the farm.
36 P.R. 1885.

I.—‘ Possession.’**(1) Possession, meaning of :—**

- (a) ‘ Possession ’ in this article means not only *actual* or *khas* possession, but also possession by receipt of rents and profits. 10 C. 1102 ; 5 M. L.J. 95.
- (b) In order to constitute possession in a legal sense, there must exist not only the physical power (or rather the possibility) to deal with the thing as we like and to exclude others, but also the determination to exercise that physical power or control on our own behalf. 8 O.C. 177 (at pp. 180 & 181).
- (c) In order to prove possession, it is not necessary to prove an actual physical continuous possession. *Per* Sir Barnes Peacock in 3 W.R. 73.

(2) Possession does not imply actual user :—

Possession does not necessarily mean actual user. If land of which possession is sought is not capable of actual enjoyment, a presumption may be drawn that possession followed title and that such possession as the nature of the case admitted continued within 12 years prior to suit.
9 C. 744 (F.B.).

(3) Distinction between joint possession and exclusive possession :—

Cases of joint possession ought to be distinguished from a case of exclusive possession of the same property at different periods or a case of *contrario possessio*. 14 M. 158 (at p. 162), cited in Mitra on Limitation, at p. 1045.

(4) Nature of possession to constitute adverse possession :—

To constitute a title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity and in extent, and it is displaced by evidence of partial possession by the party, against whom the title by adverse possession is claimed. 4 Bom. L.R. 28.

(5) Nature of possession to be proved :—

Possession, to be adverse, must be shown to be continuous, public and adequate to the circumstances of the case. 25 B. 362 (306) = 27 C. 943 = 5 C.W.N. 597 (P.C.).

(6) Presumption of possession following title :—

- (a) Where plaintiff has an undoubted title to a certain land and defendant has no such title nor can prove adverse possession for more than 12 years before suit, the land being under water during the first two

1.—Possession.—(continued).

years of such 12 years and no act of possession being proved by either party during the two years of the submersion of the land, there will be a presumption that possession followed title and that plaintiff's possession continued to a time within 12 years prior to suit. 19 C. 660=19 I.A. 140 (P.C.).

(b) No presumption should be made in favour of acquisition of title through irregularity in the execution of legal process. U.B.R. (1892-1896), 458.

(7) Possession, presumption as to :—

A talukdar is entitled to waste lands, jungle lands, &c., in his *taluka*. He is, therefore, presumed to be in possession, evidence of physical acts of enjoyment not being necessary, until he is actually dispossessed. In a suit for possession of such land by the talukdar, the burden is on the defendant to prove dispossession. 8 O.C. 177. (Current Index 1905 under the heading Limitation Act, art. 142).

(7-a) Possession of owner—Possession of wrong-doer :—

Possession by owner of a part of a property is presumptive evidence of possession of the whole ; but possession of a wrong-doer of a part is not possession of the whole. 1 C.W.N. 304.

(7-b) Possession—Presumption—Lands emerging from a beel :—

The presumption is that lands emerging from a *beel* are in the possession of the owner, until the contrary is shown, when such lands, whether culturable or unculturable, remain waste. 1 C.W.N. 304.

(7-c) Possession—Forest lands—Evidence :—

Where a tract of forest land with a defined boundary has been throughout claimed by a person as owner and acts of ownership have been done on various parts of it, such acts may be accepted as evidence of the possession of the whole tract. 9 M. 285.

(8) User of land of small value :—

The use, by a neighbour, of a small piece of land of a trifling value and of no present use to the owner, will not, though it may be for more than 12 years, constitute adverse possession, as against the owner, so as to give a prescriptive title. 16 B. 338. Cf. 21 M. 53.

(9) Possession as between tenants-in-common or joint owners :—

(a) Where, as between tenants-in-common, one tenant in actual occupation resists another's taking possession simply with the object of protecting himself in the profitable use of the land in his possession and not in denial of that other's title, the tenant obstructed cannot be given joint possession or damages or injunction. 18 C. 10 (P.C.)=17 I.A. 110 (reversing 15 C. 14).

(b) As long as joint property is used consistently with the continuance of joint ownership and possession, without exclusion of the joint owners, who do not join in the work, there is no encroachment on the rights of any of them as regards common enjoyment so as to afford grounds for a suit. 19 C. 253=19 I.A. 48 (P.C.).

1.—Possession.—(continued).

- (c) Where the disputed property was in defendant's possession for more than 12 years before suit, in the absence of a claim by the plaintiffs that they were joint owners thereof with the defendant or allegation that the defendant's occupation was permissive or that he had no knowledge of the defendant's possession, a suit brought by the plaintiffs to set aside a sale of the property by the defendant and for a declaration that it was plaintiffs' undivided ancestral estate was barred by limitation whether art. 127, 142 or 144 applied to the suit. L.B.R. (1898-1900), 522.

(10) Mortgagee can't set up adverse possession :—

A person entering into possession as mortgagee cannot, afterwards, set up an adverse possession as owner so as to defeat the mortgagor's right to redeem. 14 B. 279.

(11) Suit for possession of trees :—

A suit for recovery of mango trees belonging to the plaintiff and standing on his own land but the fruits whereof were taken by defendant for more than 12 years before suit, *held* to fall under this article, trees being an interest in immoveable property, or under art. 144, the possession of defendant by taking the fruits being adverse. 16 B. 853.

(12) Trespasser's possession can't be tacked to another trespasser's :—

In computing the period of adverse possession, the trespasser-defendant cannot add to his own possession the period of another trespasser's possession. A decree obtained by one trespasser against another trespasser, cannot affect the position of the true owner. Applicability of art. 142 or 144 considered. 2 C.W.N. 815.

(13) Effect of possession under S. 15, Act XIV of 1859 :—

Where plaintiff was out of possession for 12 years before suit, possession by him, prior to dispossession, under Act XIV of 1859, S. 15 (corresponding to S. 9 of the Specific Relief Act), gave no fresh cause of action so as to bring the suit for possession within time. 3 B.L.R. Ap. 85=12 W.R. 9; See also 22 W.R. 259.

(14) Effect of symbolical possession :—

- (a) Where a defendant in a suit for possession remains in possession after delivery of symbolical possession to the plaintiff-decree-holder, he is considered to be a trespasser committing a fresh act of dispossession and the plaintiff-decree-holder will have 12 years from the date of symbolical possession for recovery of the property. 8 C.W.N. 49; cf. 4 C.W.N. 297; 10 M. 58 & 24 C. 715.

- (b) A suit to recover actual possession, brought by a purchaser at Court-sale within 12 years from the date of the symbolical possession, will be in time. 2 Bom. L.R. 407.

- (c) But, if the defendant shows more than 12 years' adverse possession before suit, the plaintiff's suit will be barred. See 16 B. 722.

1.—Possession.—(concluded).

- (d) Where the purchaser of certain property at a private sale, who had obtained only symbolical possession through Court, sued, for possession, the purchaser at an auction-sale, who was in actual possession thereof and where the possession of the auction-purchaser, when tacked on to that of the judgment-debtor, amounted to more than 12 years' adverse possession, the suit was barred, the plaintiff's symbolical possession not breaking up the continuity of the defendant's possession. 19 B. 620.
- (e) A suit by a purchaser at Court-sale for actual possession of property, symbolical possession whereof was delivered to him, if brought within 12 years of such symbolical delivery, will be in time. 16 C. 530 (F.B.).
- (f) If a third party be in possession of property, of which possession is delivered to a decree-holder or purchaser and if such third party be present at the delivery and has knowledge thereof, the delivery will have the same effect as delivery of actual possession and time would begin to run as against the third party from the date of such delivery. 27 M. 262 (at pp. 269 & 270).
- (g) Symbolical possession of a dwelling house or a share of a dwelling house of which actual possession might have been granted is not such a *bona fide* possession as can save limitation. 5 C. 331.
- (h) But see 5 C. 584, where it is held that, as between parties to the suit such possession is enough to give a title as against the judgment-debtor. If the person, who is given such possession, is again dispossessed by the judgment-debtor, the former may maintain a suit within 12 years of such dispossession. 5 C. 584 (F.B.) = 5 C.L.R. 548; 7 C. 418; 10 C. 938; 10 M. 17; 4 C. 870 = 4 C.L.R. 55 Cf. 6 C.L.R. 539 on the same point.
- (i) Symbolical possession given under a decree does not entitle the person, to whom such possession has been given, to count a fresh period of limitation as against a third person (e.g.) a claimant. 11 C. 395.

(N.B.)—See, further, cases under Heading 'Possession' under art. 144, *infra*.

2.—Immoveable property.

(1) Right to collect rents:—

A right to collect rents or *melwaram* from tenants having occupancy or *Kudiraram* right is 'immoveable property.' 5 M.L.J. 95: Cf. 13 M. 54; 12 B. 221 & 19 C. 544.

(2) Saranjam lands—Right of management:—

The right of management of *saranjam* lands is an interest in immoveable property. If one of the members of a joint family has the exclusive management of such lands for more than 12 years, he will acquire a right by prescription to such management. 15 B. 247.

(N.B.)—See, further, cases under the Headings, 'Immoveable property' and 'Interest in immoveable property' under art. 144, *infra*.

3.—Dispossession or discontinuance of possession.

(1) Meaning of the term "Dispossess":—

To dispossess the owner, the dispossessor must assert clearly that he claims to hold possession as owner, or his conduct must be such as to amount to an assertion of an intention to exclude the actual owner. In other words, there must be evidence of a determination to exercise physical power to deal with the land on his own behalf. 8 O.C. 177.

(2) Meaning of 'discontinuance':—

(a) The word 'discontinuance' in art. 142 refers to a case where the person in possession goes out and is succeeded in possession by another. 1 C. W.N. 277 (*following* 6 C. 311). See also 7 M.L.J. 186 (No. 5 *infra*).

(b) A person, who leaves property and goes away without any intention of returning to it, may afterwards change his mind and seek to recover the property. In such a case, he ought, if somebody else had taken possession, to sue within 12 years from the date of his discontinuance of possession. 85 P.R. 1892.

(3) Dispossession as between tenants-in-common:—

In the case of tenants-in-common, there is no ouster or adverse possession until there has been a disclaimer by the assertion of a hostile title, and notice thereof to the owner, either direct or to be inferred from notorious acts and circumstances. 8 M.L.J. 92.

(4) Government farming lands to a stranger:—

Where the Government farmed certain lands to a stranger for the term of a settlement and the proprietors thereof agreed to such arrangement, there could be no 'dispossession' or 'discontinuance of possession' by the proprietors, within the meaning of this article. 104 P.R. 1893.

(5) Non-user:—

Discontinuance of possession takes place only when the man in possession goes out and is followed into possession by another person. Mere non-user by the owner of a house owing to its being in a bad state of repair, cannot be considered to be a discontinuance of possession on the part of the owner. Where a suit is brought for possession of such premises by the owner, the defendant will have to prove adverse possession for more than 12 years. 7 M.L.J. 186.

(6) Absence no discontinuance of possession:—

(a) Where the owner of certain land was a female, the mere fact that she was living with her husband elsewhere would not amount to discontinuance of possession within the meaning of this article. 49 P.R. 1884.

(b) Two persons jointly purchased land, one occupied it, the other did not, owing to his absence at another station, but occasionally came to the land. Thereafter, the absentee-owner sued for possession of a moiety of the land. *Held*, the case was not one falling under art. 142 but under art. 144, because there was no dispossession or discontinuance of possession, the burden of proving adverse possession lying on defendant. 14 M. 96.

3.—‘Dispossession or discontinuance of possession.’—(continued).

(7) Commencement of limitation :—

- (a) The period of 12 years should be computed from the date when the plaintiff, or those from whom he derives his title to sue, discontinued possession, irrespective of the period that has elapsed since the entry of the defendant. 6 P.R. 1896.
- (b) Where a plaintiff-owner is out of possession for more than 12 years and the defendant has all along been in possession without recognising the plaintiff's title, the plaintiff's suit for possession would be governed, and barred, by this article. 21 M. 169.
- (c) Where there has been possession followed by a discontinuance of possession, time runs from the moment of its discontinuance, whether there has or has not been any adverse possession, and without regard to the intention with which, or the circumstances under which, possession was discontinued. 5 C. 676 – 5 C.L.R. 527.
- (d) A suit for recovery of possession of land must be brought within 12 years from the date possession had been lost. 2 U.B.R. 513.
- (e) Where a person was dispossessed under a certificate of sale which was not conformable to, or warranted by, the sale itself, he was entitled to bring a suit for restoration to his property at any time within 12 years from the date of his dispossession. 17 W.R. 429.
- (f) A suit for recovery of possession on the ground of dispossession is governed by 12 years' limitation. 2 U.B.R. 375.

(8) Owner not discontinuing possession—Permissive possession :—

- (a) A suit for recovery of immoveable property, against a person, who had originally been in mere permissive occupation or possession accorded on the ground of charity or relationship, is governed by art. 144 and not by this article. 6 C. 311 – 7 C.L.R. 181.
- (b) The terms ‘dispossession’ or ‘discontinuance of possession’ do not apply to the case of a permissive occupation by another or an occupation which recognises the proprietary right of another. 104 P.R. 1893.

(9) Giving up possession—Discontinuance of possession :—

Where a sonless proprietor transferred his rights in certain land to the defendant's father and gave him up possession, a suit by his heirs to recover their shares in the land, brought more than 12 years after such delivery of possession, was barred, the suit being governed by this article. 111 P.R. 1892.

(10) Discontinuance of possession—Submersion :—

- (a) The——— is that which occurs where the property is taken actual possession of by another. The words do not apply to a case of discontinuance of possession owing to submersion by the act of God. *Per WHITE, J.* in 6 C. 725.
- (b) If a man were in possession prior to submersion, his possession will be presumed to continue during submersion until he is dispossessed by another; in such a case, the dispossessor ought to prove more than 12 years' possession in himself. *Per GARTH, C.J.*, in 6 C. 725.

3.—'Dispossession or discontinuance of possession.'—(continued),

(11) Possession of property under attachment—Cr. P. Code, Ch. XII:—

(a) The legal possession of a property attached under S. 146 of the Criminal Procedure Code, is considered to be in the true owner during the attachment, because the Magistrate cannot be regarded as having dispossessed either party nor can the parties be said to have discontinued their possession during the time of the attachment. 26 M. 410. Cf. 9 C.L.R. 305.

(b) Where, on the complaint of the plaintiff, the Magistrate ordered the defendant not to build a wall till he inspected the locality, and the Magistrate, after inspection, allowed the defendant to build the wall, the defendant could not be said to have been in possession, or plaintiff dispossessed, from the date of the plaintiff's objection. 6 A.W.N. 278.

(12) Temporary interruption—Running of adverse possession:—

Where, with the exception of three years' temporary interruption of possession by a third person (which interruption was subsequently removed by Court in a suit), the defendant was in possession adversely to the plaintiff for more than 12 years, a suit by the plaintiff to recover possession of the property from the defendant was barred by limitation. 22 B. 733.

Suits under Special and Local Enactments.

(1) Suits under s. 9, Specific Relief Act:—

A suit for the possession of a right to fish in a *khal*, the soil of which does not belong to plaintiff, does not come within the article. 19 C. 544 (F.B.), PRINSEP & PIGOT, JJ, *dissenting*.

(2) Dispossession under award—Act XIV of 1859, s. 15:—

Where the plaintiff's title to certain property was invaded by an award under s. 15, Act XIV of 1859, a suit brought by him to establish his title to the property was governed by 12 years' limitation, the cause of action accruing from the date of the award. 17 W.R. 468.

(3) Suits under Act X of 1859 (Bengal), s. 23, cl. 6:—

(a) Where a landlord ejected a ryot, of his own authority, without the intervention of a Court of law or the Collector, the case fell under—
9 W.R. 513 (F.B.)

(b) Act X of 1859, s. 23, cl. 6, did not apply to a suit for a declaration of plaintiff's title to certain land and possession thereof in pursuance of that title. 7 W.R. 186 (F.B.)

(4) Ejectment suit—Act VIII of 1860 (B.C.), s. 27:—

(a) S. 27 of the above Act only applies to suits for possession independently of questions of title. 8 C. 365.

(b) The mere insertion in such a suit of a claim for a declaration of plaintiff's title would not prevent the application of the limitation prescribed by the section. 9 C. 280.

(c) The section does not apply to suits based on title, the defendant denying the title set up by plaintiff. 9 C. 423.

3.—'Dispossession or discontinuance of possession.'—(continued).

Suits under Special and Local Enactments.—(continued).

- (d) Where the only question in the suit is one of dispossession and not of title, the plaintiff's title being admitted by defendant, the latter denying the dispossession but setting up relinquishment, the above section will apply and not the general Limitation Law. 12 C. 606.
 - (e) If, however, on a denial by the defendant of a particular tenure set up by the plaintiff, the latter brings a suit for a declaration of his title to such particular tenure and for possession, the suit would not be governed by the shorter period of limitation provided by the above section but by the general Limitation Law. 14 C. 624 (*distinguishing* 12 C. 606).
 - (f) An occupancy ryot alleging ejectment in contravention of s. 22 of Act VIII of 1869 (B.C.) ought to bring a suit on the ground of illegal ejectment under s. 27 of that Act within one year from the ejectment. 4 C. 527.
- (5) Suits under Act VIII of 1885 (B.C.), s. 181 & Sch. III, art. 3:—
- (a) The suit referred to in this section is a suit by an occupancy *raiayat* as such. 15 C. 450.
 - (b) This Act has limited the period previously allowed by the Courts for suits to recover possession by reason of a title set up and proved by plaintiff; Sch. III, art. 3, is not limited only to suits of a possessory nature dealt with previously by s. 27 of Act VIII of 1869. 16 C. 741; 17 C. 926.
 - (c) The operation of the above article is not restricted to suits against a landlord alone. It also applies to a suit against a tenant, with whom the landlord has settled. 24 C. 40; cf. 24 C. 672 (at p. 677).
 - (d) Where a *raiayat* is dispossessed of his *raiayati* lands by the landlord, he must sue under the above article of Act VIII of 1885; otherwise, he will be barred; the mere fact that a Criminal Court attached the land subsequently under Ch. XII of the Criminal Procedure Code, would not give him a fresh start of limitation. 28 C. 86.
 - (e) The article of Act VIII of 1885 would apply whether the dispossession is by a fractional landlord, or the sole landlord, or the whole body of landlords. 28 C. 127 = 4 C.W.N. 801. Cf. 28 C. 127 (Note).
 - (f) A suit by an occupancy *raiayat* to recover possession, the landlord being no party to the suit, and there being nothing on the record to show that the landlord had any hand in the ouster, is governed by the 12 years' limitation. 1 C.W.N. 573. Cf. 8 C.W.N. 446 = 31 C. 647 and 29 C. 610 = 6 C.W.N. 702. (Nos. k and l, *infra*).
 - (g) But if the landlord has a hand in the ouster, even a suit by the purchaser of an occupancy ryot's holding would be governed by art. 3, sch. III of Act VIII of 1885 (B.C.) 4 C.W.N. 326.
 - (h) A suit brought not by an occupancy ryot but by a purchaser of such ryot's rights in execution of a decree against the landlord, the plaintiff-purchaser not having had possession at any time, is not governed by the above article, but by the general limitation of 12 years. 2 C.W.N. 595.

3.—'Dispossession or discontinuance of possession.'—(continued).

Suits under Special and Local Enactments.—(concluded).

- (i) The plaintiff, an occupancy *raiyat*, was ousted by defendant, who, after such ouster, took a settlement from the landlord. A suit by the occupancy *raiyat* to recover possession was held governed by the above article. 4 C.W.N. 665.
 - (j) A suit for possession, brought by a non-occupancy ryot, dispossessed otherwise than in due course of law, is governed by the six months' limitation provided by s. 9 of the Specific Relief Act. 7 C.W.N. 218.
 - (k) The above case has since been overruled by 8 C.W.N. 446 (F.B.) = 31 C. 647, which holds that a suit by such a person will be governed either by the six years' or the 12 years' limitation.
 - (l) This article would not, but the period of 12 years allowed by the general law of Limitation would, apply, when the occupancy *raiyat* is dispossessed but the landlord has no hand in the ouster. 29 C. 610 (F.B.) = 6 C.W.N. 702.
- (6) Suits under Act XII of 1881 (N.W.P. Rent):—

Cl. n of S. 95 ought to be taken to apply to cases in which a tenant of agricultural land is dispossessed by the landlord or by some one claiming title under him at his instance. 19 A. 34.

Cases relating to Burden of Proof.

(1) Suit for possession—Burden of proof:—

- (a) Where a suit was brought by plaintiff, who admittedly had a title, for recovering possession from defendant, who was alleged to be in possession for 7 years prior to suit, the defendant proved that he had the same sort of possession for over 12 years prior to suit: it was held that though, originally, the burden lay on the defendant, he had discharged it and the plaintiff having failed to rebut the evidence was held barred by this article. 23 M. 10 (P.C.) = 26 I. A. 210.
- (b) Where, in a suit for possession, the plaintiff, or the person from whom he claimed, was proved not to have had any possession at any time within 12 years before suit, the suit was held barred by limitation, the burden of proof resting on the plaintiff, and he not having discharged the burden. 20 C. 560 = 20 I.A. 38 (P.C.).
- (c) In a suit for possession, plaintiff must not only prove his anterior title, but also show his possession within 12 years prior to suit, to throw on the defendant the onus that he had a right to retain possession. 59 P.L.R. 1901.
- (d) In a suit for possession of property, plaintiff must show that his dispossession was within 12 years prior to institution of suit. 12 C.P.L.R. 130.
- (e) Where, in a suit for possession, it was proved that the defendant was in possession for a very long time, it lay on the plaintiff to show by clear and trustworthy evidence that he had possession within 12 years before suit. U.B.R. (1892-1896), 498.

3.—'Dispossession or discontinuance of possession.'—(continued).

Cases relating to Burden of Proof.—(continued).

- (f) Where, in a suit for possession of immoveable property, adverse possession is pleaded, the burden lies upon the plaintiff to let in *prima facie* evidence of his possession within 12 years of the suit, as the question of limitation becomes a question of title. 14 A. 193.
- (g) Where a suit in ejectment is brought on the ground of the defendant's wrongful possession, the plaintiff ought to show that he or his predecessor in title was in possession at some time within 12 years prior to suit. A mere allegation in the plaint that the defendant was a tenant of the plaintiff's predecessor in title will not be sufficient to relieve the plaintiff of the *onus* of proof. 10 C. 374, explaining 9 L.A. 99 (P.C.) = 5 A. 1.
- (h) In a suit for possession on the ground of dispossession, plaintiff ought to show that the dispossession occurred within 12 years prior to suit. 9 C. 744 (F.B.).
- (i) Where a suit in ejectment is rested on alleged possession and dispossession alone, neither party having any undoubted title, the burden of proof as to possession and dispossession lies on the plaintiff, who ought to prove a possession adequate in continuity, in publicity, and in extent of area; otherwise, the suit must fail. 27 C. 943 (P.C.) = 27 I.A. 136.
- (2) **Suit based on title and dispossession—Burden of proof:—**
Where, in a suit for possession based upon title, the plaintiff alleged possession and dispossession, the burden of proving his possession at some time within 12 years lay upon the plaintiff. 16 C. 473 = 16 I.A. 23 (P.C.).
- (3) **Suit for lands under cultivation:—**
In suits for lands under cultivation, the plaintiff must prove, in the first instance, that his suit is not barred by limitation; not for the defendant to prove his adverse possession. 5 C. 36.
- (4) **Suit for unculturable lands:—**
In suits for unculturable or uncultivated lands, the defendant must, in the first instance, prove his adverse possession for more than 12 years. 5 C. 36.
- (5) **Suit for lands under cultivation at time of suit:—**
In cases of suits for lands under cultivation at the time of suit but previously jungly or unculturable, the plaintiff ought to prove in the first instance that his cause of action is not barred; the burden is then shifted to defendant, and he ought to prove that he had adverse possession for more than 12 years. 5 C. 36.
- (6) **Suit for redemption—Burden of proof:—**
In a suit for possession of land by redemption of mortgage, the plaintiff must show that he has a title subsisting at the date of suit. 11 A. 438.
- (7) **Adverse possession—Burden of proof:—**
(a) Where adverse possession is pleaded, the defendant must make out the title he alleges and show that the plaintiff had lost his title. 11 A. 438.

3.—'Dispossession or discontinuance of possession.'—(continued).

Cases relating to Burden of Proof.—(continued).

(b) Where, in a suit for possession, the defendants pleaded limitation and the plaintiff proved that the commencement of the possession of the party, through whom defendants claimed, was as tenant, it then lay upon the defendants to show when the nature of that possession was changed and how it became adverse. 12 W.R. 250.

(8) Alluvial land—Burden of proof:—

Where, in a suit by plaintiff to recover possession of alluvial lands on the allegation of dispossession, the defendants denied the plaintiffs' title and possession, *held* the burden of proof as to possession and dispossession within twelve years prior to suit lay on the plaintiffs. 27 C. 221 (P.C.)—26 I.A. 236.

(9) Joint owners—Adverse possession—Burden of proof:—

Where a land, which was owned both by the plaintiff and the defendant, was in the occupancy of the latter as tenant thereof, and where the land re-appeared after having been washed away, and the latter got his name recorded as proprietor thereof: in a suit by the plaintiff to recover possession of his share, the *onus* lay on the defendant of proving that he had acquired to it a title by adverse possession. 65 P.R. 1901.

(10) Suit by assignee of a joint owner—Burden of proof:—

Where the suit land was formerly the joint property of three brothers, and one of them until his death, and, after his death, his daughter, was left in exclusive possession thereof, in a suit by the purchaser from the other brothers to recover possession of the property purchased by him, the burden of proving that the possession of the daughter was adverse to her uncles and their representatives lay on the defendants, who asserted it. 25 B. 362.

(11) Two purchasers from same owner—Waste land—Burden of proof:—

Where the purchaser of certain land brought a suit for possession thereof and the defendant set up a purchase in his favour from the same owner and it was found that the land had lain waste, the suit was governed by art. 144 and not by this article, and the burden of proving when his possession became adverse was shifted on to the defendant. 49 P.R. 1884.

(12) Admission of mortgagor's title, insufficiency of:—

Presumption arising from admission by alleged mortgagee of alleged mortgagor's original ownership of plaint land is insufficient to establish a mortgage and to shift the burden of proof and overcome the general presumption from long possession. U.B.R. (1892-1896), 509.

(13) Boundary dispute—Burden of proof:—

On questions of boundary, where the dividing line in dispute runs through waste lands, which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable. 21 C. 504 (P.C.)=21 I.A. 39.

3.—'Dispossession or discontinuance of possession.'—(continued).

Cases relating to Burden of Proof.—(continued).

(14) Burden of proof—Wrongful dispossession:—

Where the plaintiff is wrongfully dispossessed by defendant within 12 years prior to suit but the plaintiff was found unable to prove possession for more than 11 years prior to dispossession, *held*, the defendant was not relieved of his burden to prove his own title. 11 C.L.R. 133; *Cf.*, 9 C.L.R. 164.

Miscellaneous Suits.

(1) Projection of roof—Suit for possession of space occupied by roof:—

Where a suit was brought to remove the defendant's roof projecting over plaintiff's land, taking 'land' to include immoveable property of a tangible kind, the plaintiff could not, after 12 years, recover possession of the space occupied by the defendant's projecting roof. 3 B. 174.

(2) Dispossession under wrong certificate—Suit for possession:—

Where a person was dispossessed under a certificate of sale not conformable to the sale itself, he was entitled to establish his title to, and for possession of, the property within 12 years of such dispossession. B.L.R. Sup. Vol. 698 = 7 W.R. 253.

(3) Suit by assignee of mortgagee—Land farmed by Government:—

Where, in a case where the mortgagors as well as the mortgagees having refused to pay the Government revenue on the lands under mortgage and the Government farmed it to a third person, the latter's possession was *held* to be on his own account, and that a suit by the mortgagee's assign more than 12 years after the land was farmed was barred under this article. 121 P.R. 1892.

(4) Suit for land taken over by avulsion:—

A suit to recover possession of land taken over by avulsion is governed by this article, as a suit for recovery of possession of land of which the plaintiff has discontinued possession. 34 P.R. 1889.

(5) Alienation by sonless proprietor—Suit by collaterals:—

Where a sonless proprietor alienated land in favour of a stranger, a suit by the collateral heirs to recover possession of the property was governed by art. 144, the period of limitation being computed from the date of the death of the proprietor. 18 P.R. 1895 (F.B.), (*overruling* 10 P.R. 1890 & 141 P.R. 1892).

(6) Suit for redemption—Possession of mortgagee as absolute owner:—

Where an alleged mortgagee by conditional sale takes possession, not as mortgagee, but as a person entitled to full and absolute ownership, and continues in such possession for over twelve years, a suit by the mortgagor for redemption would be barred by this article. 7 O.C. 259.

3.—'Dispossession or discontinuance of possession.'—(continued).

Miscellaneous Suits—(continued).

(7) Suit by a sharer under Buddhist law:—

A——for a share against alienees from one of the sharers would, if there was a dispossession when the plaintiff was in possession along with the other sharers, be governed by this article and, if there was no dispossession, by art. 144. I.L.R. (1898—1900), 132.

(8) Suit against redeemer of mortgage:—

Where the defendant, whose claim is inconsistent with that of the plaintiff, redeemed a mortgage by plaintiff's father more than twelve years before suit and the plaintiff sued to recover the property from the redeemer-defendant, the suit was *held* barred either by this article or art. 144. I.L.R. (1892—96), 502.

(9) Suit for property handed down from common ancestor:—

In the absence of proof of participation in profits within twelve years prior to suit, a suit by plaintiffs against defendants for property handed down from a common ancestor would be barred under this article. U.B.R. (1892—96), 507.

(10) Suit by sons born since separation:—

Plaintiffs' father and defendants were members of a joint Hindu family. After the separation of their father from defendants, plaintiffs were born. Plaintiffs' suit to recover their shares in the ancestral property, brought more than twelve years from the date of separation, was *held* barred by this article, it being shown that the plaintiffs had not been in receipt of any profits since the separation and after their birth. 5 O.C. 6.

(11) Suit for possession of land washed away:—

Where land which was washed away re-appeared and the tenant thereof set up a title adverse to his landlord from the date of such re-appearance, in a suit for possession by the landlord, it was necessary for the tenant to show that there was a distinct claim of which the landlord was aware, and the landlord need not show acts of proprietorship within 12 years before suit. 105 P.L.R. 1901.

(12) Suit by one co-heir to recover his share sold by another co-sharer:—

Where one of two co-heirs, owning undivided property, sells the property in which another is entitled to a share and the latter brings a suit to recover his share sold, the suit will be governed by this article and not by article 10. 3 I.L.R. 7 (Current Index, Part 11, Cols. 90 & 91).

(13) Suit by donee—Donor out of possession:—

Where, by a deed of gift executed in his favour, the plaintiff was to get a share of certain estate, when it came to the possession of the donor, and the donor's representative in interest got possession thereof in execution of a decree obtained in a suit instituted by the donor, the cause of action for a suit by the plaintiff to recover possession of the property given by the deed of gift arose subsequent to the execution of the decree. 19 W.R. 101 (P.C.),

3.—'Dispossession or discontinuance of possession.'—(continued).

Miscellaneous Suits.—(continued).

(14) Vendee dispossessed—Suit for fresh lands :—

Where, in pursuance of an agreement between the purchaser of certain lands and one of the vendors thereof, other lands were given to the purchaser in exchange therefor and the purchaser was, by a decree, deprived of those other lands, the cause of action for a suit by the latter, to recover possession of the lands purchased by him, originated on the date of the decree, which deprived him of those other lands. 16 W.R. 270.

(15) Suit by vendee—Vendor out of possession—Burden of proof :—

Where, in a suit brought by a vendee to recover possession of immoveable property, which was not in the possession of the vendor at the time of sale, the defence is limitation, the plaintiff must prove that his vendor had been in possession within 12 years before the date of sale. 16 B. 343.

(16) Suit against second trespasser :—

'If a second trespasser dispossesses the first after the plaintiff has sued the first trespasser for possession, a second suit against the second trespasser is not barred, if it is brought within 12 years of the date when the second trespasser took possession of the property.' Mitra on Limitation at pp. 1049 & 1050 citing 13 C. 203.

(17) Suit involving question of adoption :—

As, in a suit for possession, the heirs of a deceased soulless proprietor are not bound to seek any direct relief by way of cancellation of an adoption, such a suit would be governed either by this article or art. 144 and not by art. 118. 96 P.R. 1893.

(18) Suit by mortgagor against trespasser :—

Sixty years' limitation applies to a suit for redemption against a mortgagee. If it were a suit for possession against a wrong-doer, then it is governed by 12 years' limitation. 2 U.B.R. 516.

(19) Suit by mortgagor against co-mortgagors :—

(a) Limitation for a redemption-suit by the co-heirs of a mortgagor is only 12 years from the date, when persons having no right to the property redeemed the same. 2 U.B.R. 464.

(b) Plaintiff mortgaged his land, which he sued to redeem. Defendant claimed to have redeemed the same land in his own right. Plaintiff's remedy is not by way of redemption but a suit for possession of property within 12 years from date of defendant's possession. 2 U.B.R. 469.

(20) Sale by guardian—Suit by minor for recovery of property sold :—

Where the person, who executed a sale-deed on behalf of a minor was not the lawful guardian of that minor, a suit brought by the minor for possession of the property so sold, by cancelment of the sale-deed, was governed by this article or art. 144. 8 A.W.N. 152.

3.—‘Dispossession or discontinuance of possession.’—(concluded).**Miscellaneous Suits.—(concluded).****(21) Dispossession of tenant—Suit by landlord :—**

Where the plaintiff's tenant was ejected in execution against a third party, the plaintiff was not bound to apply under S. 246 or 269 of Act VIII of 1859, but was entitled to file a regular suit to establish his title and recover possession at any time within 12 years from the date of the dispossession. 5 Bom. H.C.A.C. 189.

(22) Lessor's right to sue trespasser—Subsistence of lease :—

As long as a lease by the owner to a third person subsists, the owner cannot sue, in ejectment, a person who has dispossessed the lessee; his cause of action arises only on the determination of the lease. 10 C. 577.

(Old Law).**(1) Act XIV of 1859, s. 1, cl. 12 :—**

A suit to recover excess lands wrongfully taken under colour of a decree fell within the provisions of ——. 13 W.R. 459.

(2) Dispossession in execution—Suit for possession :—

Where a possessor was dispossessed under a sale in execution against other parties, he was entitled to sue within 12 years from the date of such dispossession to establish his title to, and recover possession of, the property. B.L.R. Sup. Vol. 643 = 7 W.R. 256.

143.—Like suit, when the plain- *Twelve years.* When the forfeiture
tiff has become entitled by is incurred or the
reason of any forfeiture or condition is broken.
breach of condition.

(Old Acts.)

[Act IX of 1871, art. 144 :—Same as above.

Act XIV of 1859 :—No corresponding provision.]

(Notes)**Scope of article.***

This article only applies to a case where the plaintiff is entitled to possession by reason of forfeiture or breach of condition, that is, a condition of the tenancy and not to a case where he would be entitled to possession only upon the non-compliance by the defendant with an order of the Court. 9 C.W.N. 464. (F.B.)

Mortgagor and mortgagee :—

A suit by a mortgagee for possession by virtue of a provision for possession being taken by him in the case of default in payment of any instalment must be brought within 12 years from date of the first default, 10 P.R. 1901.

Scope of article.—(concluded).

Mortgagee's suit for possession on mortgagor's default:—

If a mortgage-deed gives the mortgagee a right to take possession upon default in payment of the mortgage-money, the mortgagee has 12 years from the time at which his right to possession commences, in which he may bring his suit for possession. But if the mortgage-deed contains no such stipulation, the right of the mortgagee to take possession would not accrue until after the expiration of the year of grace. 10 C. 68 = 13 C.L.R. 51.

Where the mortgage-bond provides that, in default of payment of any instalment, the mortgagor must deliver possession of the mortgaged property, *held* that a suit by the mortgagee to recover possession of the mortgaged property must be instituted within 12 years from the date of the first default. 81 P.L.R. 1901.

Where a lease stipulated for the ejectment of the tenant on failure to clear a defined area by a certain time, the cause of action for a suit for ejectment accrued when the defendant did not clear by the time specified. 7 W.R. 200.

In a suit by a mortgagor to eject the mortgagees after cancelment of the mortgage-deed for breach of a condition in the mortgage-deed to pay a certain annuity to the mortgagor, each failure to pay the stipulated annuity was considered as a new breach giving a new right to eject. 7 N.W.P.H.C. 53.

A suit for possession of land, commensurate in value to the amount of annual fees agreed to be paid by the purchaser to the vendor, when the land was sold, must be brought within 12 years from the first breach of the agreement. There is no continuing breach, under S. 23. 4 A. 493.

144.—For possession⁽¹⁾ of im- *Twelve years.* When the possession
moveable property⁽²⁾ or any of the defendant
interest therein⁽³⁾ not here- becomes adverse⁽⁵⁾
by otherwise specially pro- to the plaintiff.
vided for⁽⁴⁾.

(Old Acts).

[Act IX of 1871, art. 145 :—] 1st & 2nd cols. same as above.

Act XIV of 1859, s. 1, cl. 12:—To suits for the recovery of immoveable property or any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose].

(Notes)

Scope of article. • •

(1) **Act XIV of 1859 and later Acts compared:—**

Under Act XIV of 1859, twelve years' adverse possession barred a suit without extinguishing the title, but the effect of the later Acts is not merely to bar the remedy, but to extinguish the title of the original owner after 12 years of a possession adverse to him. 1 B. 592.

Scope of article.—(continued).

- (2) According to article 145, Act IX of 1871, corresponding to the above article in the present Act, a suit for possession of immoveable property, or any interest therein, must be brought within twelve years from the date when the defendant's possession had become adverse to the plaintiff; whereas, under Act XIV of 1859, s. 1, cl. 12, the suit must be instituted within twelve years from the time when the cause of action arose. 5 A. 1 (P.C.) = 9 I.A. 99.
- (3) **Law of limitation—Its operation :—**
The law of limitation operates against parties guilty of delay and in favour of persons in possession. 17 M. 255.
- (4) **Application of article :—**
This article applies only where there is no other article in the schedule specially providing for the case. 17 C. 137 16 I.A. 148 (P.C.)
- (5) **Suit for interest in immoveable property :—**
(a) This article bars only suits for interests which have been openly claimed or exercised by the person in possession. 5 Bom. L.R. 186.
(b) Where dispossession is not alleged, a suit for possession of an interest in immoveable property would be governed by this article. 10 C. 697.
- (6) **Burden of proof :—**
(a) The essential preliminary for the operation of this article is that it lies upon defendant to show that he held adversely more than 12 years prior to suit. 5 Bom. L.R. 743.
(b) In cases falling under this article, the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than 12 years before suit. 14 B. 458.
(c) Where a suit falls under this article, the plaintiff need not, in the first instance, prove that he was in possession within 12 years prior to suit, but it is for the defendant to show that he has been in adverse possession for more than 12 years before suit. 14 M. 96; 14 B. 458; 13 B. 325; 13 B. 424.
(d) When, in a suit for possession of immoveable property, adverse possession is pleaded as a defence, the defendants' adverse possession for more than 12 years—and not the plaintiff's possession within 12 years—before the suit, must be considered. 2 A.W.N. 40.
(e) A suit for possession by a person, who alleges that he has been dispossessed by the defendant, would fail, if it is proved that the latter was in adverse possession thereof for more than 12 years before suit. 14 C. 109 = 13 I.A. 160. (P.C.)
(f) Under this article, it must be shown when the adverse possession set up by the defendant commenced. 4 Bom. L.R. 99.
(g) In a suit for ejectment based on dispossession, the plaintiff must prove possession and dispossession within 12 years. Such a case falls within art. 142. 6 B. 508.

Scope of article.—(continued).

(7) Declaratory suits:—

(a) A suit by a person in possession of land for declaration of proprietary right, being substantially a suit for possession of immoveable property, was governed by article 145, Act IX of 1871. 3 A.40.

(N.B.)—Later decisions lay down that a suit for declaration does not fall within the scope of this article.

(b) This article applies only to a suit for possession (*i.e.*) the suit must have for its object the taking of possession from a person in possession. It would not apply to suits for declaration merely. 20 A. 35 17 A.W.N. 153; 16. C. 79. 1 C.L.J. 73.

(N.B.)—*See*, further, cases under the Heading '2.—Declaratory Suits' under art. 120 at pp. 908 to 911 (both inclusive) and '3.—Suit by reversalors' at pp. 911 to 913 (both inclusive).

(8) Possession—Lands under attachment by Magistrate:—

(a) Lands under-attachment by a Magistrate under s. 146 of the Crim. Pro Code, are presumed to continue in possession of the person, who is afterwards found to have title thereto. Time does not run against such person during the attachment. 1 C.W.N. 569.

(b) A suit to recover possession of immoveable property attached by a Magistrate under S. 146 of the Code of Criminal Procedure, held governed either by article 142 or this article. 20 A. 120 = 17 A.W.N. 214.

(9) Suit by person restrained by Mamlatdar's order:—

Where the owner and mortgagor of certain land was restrained by an order of a Mamlatdar's Court from interfering with the possession of the tenant, a suit in ejectment by the assignee of the rights of the mortgagor and mortgagee against the tenant, instituted more than 12 years after the Mamlatdar's order, was barred. 18 B. 348.

(10) Suit for land—Dispossession by Magistrate:—

Where it was proved that the plaintiff, who was deprived of certain land by order of a Magistrate, was in possession thereof within twelve years before a suit by him for possession of it, the statute of limitation could not be set up as a bar against the plaintiff's title. 20 W.R. 25 (29).

(11) Possession under erroneous order:—

Possession given under an erroneous order of Court, or under some misconception, subsequently rectified, will not enable a plaintiff to defeat a defendant's plea of limitation. (Glover, J. *dissenting*). 2 B.L.R.A.C. 173 = 11 W.R. 49.

(12) Burden of proof of specific title set up:—

In a suit for possession, plaintiff must succeed only on the strength of the specific title relied upon by him. He cannot be allowed to succeed on another title based upon long and undisturbed possession, unless such other title had been raised on the pleadings. 11 C.L.R. 899.

Scope of article.—(continued).

(13) Joint-family property :—

An exclusion from all ancestral property is not necessary to give rise to a bar by limitation. If a share is claimed in a certain property and if that particular property is held by another member adversely to the claimant, the latter's suit will be barred so far as that property is concerned. 86 P.R. 1888.

(14) Suit by owner against permissive occupier :—

- (a) Where a house was in the occupation of the defendants under an agreement to occupy it for a certain time, a suit by the owner to recover possession thereof, brought within 12 years from the date of the expiration of the term, was not barred, whether art. 139 or this article applied to the case. 23 B. 283.
- (b) A suit against person in permissive possession is governed by this article and not by art. 142. G C. 311 = 7 C.L.R. 181. (See same case under art. 142, p. 1059 *supra*).

(15) Permissive possession.—Burden of proof :—

- (a) Where, in a suit for possession, the plaintiff alleges that the possession of the defendant is permissive, the *onus* lies on him to prove such permissive possession. 116 P.R. 1888.
- (b) This article, and not art. 142, applies where the possession of the defendant, being in the beginning lawful, has subsequently become adverse. In such a case, the burden lies on the defendant of showing how and when his possession became adverse. 21 M. 153 (159) = 8 M.L.J. 92.
- (c) Where the commencement of the defendant's possession was with the plaintiff's consent and was therefore permissive, the *onus* lay on the defendant to show when his permissive possession became adverse to the plaintiff. 94 P.R. 1884.
- (d) G C. 311 = 7 C.L.R. 181; 104 P.R. 1893, at p. 1059 under Heading 'Dispossession or Discontinuance of possession.'

(16) Suit for land re-formed on original site :—

Where the purchaser of certain *chur* lands, re-formed on its original site, sued for possession thereof and the defendant pleaded limitation by adverse possession, the *onus* lay upon the plaintiff to prove that, before disappearance or deluvion, the land in dispute was in the possession of his vendor. 23 W.R. 443.

(17) Hereditary offices :—

This article bars a suit for possession of an hereditary office, if brought after 12 years from date of adverse possession. 2 Bom. L.R. 597 (599).

(18) Management of religious institution :—

The article is applicable to enforce a right to manage a religious institution exclusively. 14 M. 153.

(19) Proprietor and farmer :—

Where proprietary rights of a village are in abeyance, as in the case of a farm, a suit for possession brought within 12 years of the farm coming to an end, will be governed by this article and not barred. 36 P.R. 1885.

Scope of article.—(continued).

(20) Creditor's suit for possession:—

Where, though by an instrument, an assignment or appropriation was made of the rents of certain lands till payment of debt and the creditor was empowered to take *kabuliyats* from tenants and to make recoveries, the creditor was kept out of possession, a suit by the latter for possession is governed by this article, and will be in time if brought within 12 years from the date of the instrument. 16 B. 172.

(21) Suit for land and opening of water-course.

Suit for recovery of land and opening a water-course belonging to the plaintiff and closed by the defendant, is governed by the 12 years' limitation contained in this article, and not by art. 37. 4 W.R. 107.

(22) Suits involving question of adoption:—

See, 19 M.L.J. 144. No. 2, p. 1053. See, further, cases under the Headings 'A.—Articles inapplicable' and 'B.—Articles applicable' under arts. 118 & 119, at pp. 896 to 902, *supra*.

(23) Contrast between this article & art. 142:—

See 17 C. 137 (P.C.) = 16 I.A. 148 = 23 P.R. 1890 & L.B.R. (1905), 56; L.B.R. (1893-1900), 960; 2 U.B.R. (1897-1901), 461; 14 B. 458; 41 P.R. 1881.

(24) Prescriptive title—Burden of proof:—

A plaintiff must show not only that he has a title, but must also show that at the date of the suit he had a subsisting title not lost by the prescriptive sections of the Limitation Act. 9 M. 175.

A.—Suits falling within the article.

(1) Suits by Mahomedan heirs:—

(a) A suit by a Mahomedan heiress, against other members of her family, for her share in the estate of her mother is governed by this article, and not by art. 123. 16 M. 61 (F.B.) = 2 M.L.J. 200.

(b) In the absence of proof of the joint status of family, a suit by the daughter of a Mahomedan owner to recover her share in her father's property, brought more than 12 years after the owner's death, was barred. 89 P.R. 1888.

(c) A suit by a Muhammadan for a share in the property to which he became entitled under a will left by his paternal grandfather, was governed by this article, and the plaintiff must show that he had possession within 12 years before suit. 86 P.L.R. 1902 = 30 P.R. 1902.

(N.B.)—See, further, cases Nos. 1, 2 & 3 under the Heading '3.—For a distributive Share' under art. 123 at pp. 938 & 939, *supra*.

(2) Suits involving the setting aside of alienations or deeds:—

(a) A suit to cancel an alienation made by the guardian of the plaintiff while the latter was a minor, and to recover possession of the property comprised in the instrument, would not be governed either by art. 44 or 91, but only by art. 142. 5 A. 490; 3 A.W.N. 647.

Scope of article.—(continued).

A.—Suits falling within the article.—(continued).

- (b) A suit by a Mahomedan heir to recover property covered by a death-bed gift made by a father to the prejudice of other heirs, is governed by this article and not by art. 91, because the deed is a nullity and there is no necessity to set it aside. 52 P.R. 1895.
- (c) Where it is essential to set aside a deed before any other relief can be granted the suit will become barred unless the cancellation of the deed is asked for in time. 75 P.R. 1896.
- (d) A suit to recover immoveable property alienated under a deed which is null and void as against the plaintiff, is governed by this article. 74 P.R. 1904; 2 P.L.R. 1905 & Cf. 8 O.C. 191.
- (e) A suit by the junior members of a Malabar *tarwad* for a declaration of the invalidity of a *kanom* by a *karnavan* as against them, is not governed by article 91, and is not barred even though brought beyond three years from the date of the deed. 14 M. 101; Cf. 16 M. 311 & 3 M.L.J. 144 at p. 828, *supra*.
- (f) A suit to recover possession of immoveable property of a ward, alienated by the guardian with the sanction of Court under Act XI, of 1858, falls under this article. 5 C. 363 & 5 C.L.R. 374.
- (g) A suit to recover possession of property, after cancellation of a sale made by the guardian of the plaintiff during the latter's minority, would be governed by art. 44 if the guardian were a lawful guardian; if not, it would be governed by this article. In the former case, the alienation would bind the minor until it is set aside; whereas, in the latter, the minor would not be bound: he may treat the sale as non-existent. 8 A.W.N. 152.
- (h) A suit by a minor, who has attained majority, to recover possession of properties alienated, without necessity, by his guardian by a deed, is not governed by art. 44 or art. 91, as it is unnecessary for him to get the deed cancelled as a condition precedent to his recovering possession. 7 M.L.J. 131.
- (i) A purchaser of joint family property from a Hindu father without the consent of the son can be sued at any time within 12 years before the possession of the purchaser becomes adverse under this article. 3 Bom. L.J. 682.
- (j) A decree is not a 'deed' or 'instrument.' A suit, therefore, to recover property covered by a compromise-decree is not governed by art. 91 but by this article. 8 O.C. 191. (Current Index, Civil Procedure Code, S. 462).

See, further, cases noted under art. 91 under the Headings '**Examples of inapplicability of article**' and '**Examples of applicability of article**' at pp. 828 to 836 (both inclusive), *supra*.

(3) Suit for possession—Court-sale a nullity:—

When a sale in execution is a nullity so far as the rights of a third party are concerned, such third person may bring a suit to recover possession within twelve years from the date he loses possession. 26 A.346 = 1 A.L.J. 59.

Scope of article.—(continued).

A.—Suits falling within the article.—(continued).

(4) Suit by adopted son :—

(a) A suit by an adopted son to set aside alienations by his adoptive mother (widow of the last male owner) before the adoption, is governed by this article. 26 M. 143 12 M.L.J. 197.

(b) A suit by an adopted son to recover possession of moveable and immoveable properties of his adoptive father in wrongful possession of the defendant, is a suit for possession on title, and is governed not by article 119 but by this article. 26 A. 10.

(5) Suit involving setting aside of adoption :—

Where, in a suit for possession, the plaintiff is not bound to seek any direct relief by way of cancellation of an adoption, it will be governed by art. 112 or this article. 96 P.R. 1893.

(N.B.)—See, further, cases under arts. 118 & 119 under the Headings 'A.—Articles inapplicable' and 'B.—Articles applicable' at pp. 896 to 902, *supra*.

(6) Suit by reversioner :—

A suit by a reversioner to recover possession of immoveable property, on the ground that the alienation in favour of the defendant made by the last owner was without consideration and was not binding on him, was governed by this article, as it was a suit for possession. 155 P.R. 1889.

(7) Assignee from reversioner :—

Suit by ———. See 8 C.W.N. 535, 802 at p. 1009, *supra*.

(N.B.)—See, further, cases under art. 141 under the Headings 'Whether reversioner is barred if female heir is barred' at pp. 1034 to 1040 (both inclusive) and under the Headings, A, B, C & D at pp. 1011 to 1047 (both inclusive), *supra*.

(8) Suit by son for property devised by father :—

• A suit by a son to recover immoveable property (on the basis of his title) comprised in a will left by his father to his detriment, was governed by this article, notwithstanding his omission to sue for a cancellation of the will or for a declaration that it was null and void. 56 P.R. 1894.

(9) Suit by the collateral of a sonless proprietor (Punjab) :—

A ——— to recover possession of property in the hands of the proprietor's vendee or donee, is governed by this article, and will not be barred simply because it is brought more than 6 years from the date of the sale, there being no necessity in such a case to set aside the sale. The adverse possession in such cases begins only on the vendor's or donor's death. 116 P.R. 1890; 18 P.R. 1895.

Scope of article.—(continued).

A.—Suits falling within the article.—(continued).

(10) Suit for declaration and possession :—

A suit for declaration of title and for possession, in consequence of an adverse order passed under S. 246 of Act VIII of 1859, such suit being brought after the present Limitation Act came into force, was held governed by the general limitation of 12 years provided by this article and not by art. 11. 9 C. 230—11 C.L.R. 363; compare 9 C. 163—11 C.L.R. 409, which held art. 120 was applicable.

(11) Suit under S. 331, C.P. Code :—

A suit under S. 331, C.P. Code, ought to be treated as an ordinary suit for possession governed by this article or art. 138, so far as the rights of the purchaser and the constructor are concerned. 18 B. 37.

(12) Suit by purchaser :—

- (a) Suit for possession by a purchaser instituted more than 12 years after his purchase, would be barred. 15 B. 261.
- (b) A suit by a vendee of immoveable property to assert his proprietary right in the estate, is governed by this article and not art. 113. 6 A.W.N. 96.
- (c) Where lands were sold in execution of a decree, a suit to recover them from a person having no title thereto was governed by this article. 15 B. 261.
- (d) A suit to obtain possession by a purchaser, by virtue of a sale of the vendor's right, title and interest conveyed under a private sale, is governed either by art. 136 or this article. 2 A. 718.
- (e) If, in a suit by a vendee for possession, it be found that neither the plaintiff nor the vendor was in possession within 12 years prior to suit, the suit would be barred. 1 A.W.N. 70.

(N.B.)—See, further, cases under the Headings, 'Scope of article' and 'Purchaser at a private sale' at pp. 1009 to 1611 (both inclusive).

(13) Suit for possession—Settlement within twelve years :—

Where settlement was made within twelve years before suit with the party from whom the plaintiff claimed and the defendant admitted that settlement was made with the party in possession, the plaintiff's suit for possession was not barred. 24 W.R. 315.

(14) Suit based on compromise in previous suit.

A suit to recover possession of land, based on compromise effected in the course of a previous litigation between the parties, was governed by article 145 further, art. 144 of this Act) and not by article 113 (= 118 of this Act) of IX app 371. 25 W.R. 521.

(15) Suit for possession after foreclosure.

A mortgagor to obtain possession after foreclosure would be in time if he brought his suit within 12 years from the date of the expiry of the year of concernment by foreclosure-proceedings, though more than 12 years from the date of default, which entitled him to obtain possession, 7 C.L.R. 583.

Scope of article.—(continued).

A.—Suits falling within the article.—(continued).

(16) **Suit by mortgagee-purchaser.**

In a suit for possession of mortgaged property by a decree-holder-purchaser in execution of his mortgage-decree, against the purchaser of the same property in execution of his money-decree, limitation runs from the date the latter was put in possession by the Court Amin. 3 A.W.N. 192 (following 4 A. 184.)

(17) **Suit on mortgage by person out of possession.**

A suit on a mortgage by a person out of possession for more than 12 years before the mortgage, some strangers having assumed possession as against the mortgagor, would be barred under this article. 18 M. 193 - 4 M.J. J. 275.

(18) **Suit for redemption against stranger:—**

A suit, in which it is found that a stranger had held possession not from the mortgagee but under the Government under a title adverse to that of the plaintiff for more than 12 years, was held barred. 2 M. 226.

(19) **Suit by mortgagee-purchaser for share purchased:—**

Where the mortgagee with possession of the entire undivided estate purchased a certain share therein, while the mortgage subsisted, from one who was not in actual possession, and the mortgage was subsequently redeemed by the purchaser of the equity of redemption of the entire estate, a suit by the mortgagee-purchaser for recovery of possession of the share purchased by him brought more than 12 years from the date of the mortgage to him, would be barred. 14 C. 674.

(20) **Suit by mortgagee by conditional sale:—**

A suit to recover possession by a mortgagee by conditional sale, instituted more than 12 years after the date fixed for repayment of the mortgage-money, was barred either under this article or art. 185. 85 P.R. 1899.

(21) **Suit by mortgagor's representative against stranger:—**

A suit by the representatives of the mortgagor to have their rights declared to the mortgaged property against a person (who had redeemed the property claiming as the mortgagor's heir) in possession for more than 12 years before the suit, is barred by limitation. 3 A.W.N. 178.

(22) **Suit against a conditional mortgagee:—**

This article governs a suit for redemption by the mortgagor against a conditional mortgagee who holds the mortgaged property, after the expiry of the mortgage term, adversely and in his own right under the terms of the conditional sale and not art. 148. 2 A.W.N. 84.

(23) **Suit for redemption of kanom:—**

A suit was brought for redemption of a *kanom* of an earlier date and a smaller sum. The defendant set up a renewal of a later date and for a larger sum more than 12 years before the present suit was brought by the plaintiff. Held, the suit was not barred. 131

Scope of article.—(continued).

A.—Suits falling within the article.—(continued).

(24) Suit for redemption against redeeming co-owner:—

Where a co-owner of certain property, after redeeming a mortgage thereon, obtained possession of the whole property and continued in possession for more than 12 years, a suit brought thereafter by the other co-owner to recover his share in the property was barred, art. 148 not being applicable to the suit. 26 B. 500.

Cf., 11 B. 422; 11 B. 425 & 16 B. 191.

(25) Suit for possession from an Ijaradar holding over:—

When plaintiff purchased a taluk at an auction, it had been held by the defendant under an unexpired *ijara*; the defendant continued in possession even after the expiry of the *ijara*. For a suit by the plaintiff to recover the property, the cause of action was held to arise after the expiry of the *ijara*, and if the suit were brought within 12 years from that date, it would be in time whether article 139 or this article applied. 9 C. 367 - 12 C.L.R. 19. Compare W.R.Cap. p. 375.

(26) Suit against possessor by fraud:—

Where a person obtains fraudulent possession of certain property, a suit to recover the property would be in time if brought within 12 years from the date of such possession. 13 C. 203.

(27) Suit by a member of a family not joint:—

If, in a suit for possession by a member of a family admittedly not joint, the plaintiff does not prove possession within 12 years before suit, the suit must fail. 14 C. 610.

(28) Suit for land abandoned:—

The mere fact of abandonment cannot deprive the owner of his proprietary right; and a suit to recover possession of the land abandoned, instituted within 12 years from the date of such abandonment, is in time. 85 P.R. 1892 (F.B.)

(29) Bairagi's suit for recovery of his property:—

Where a Hindu became a *bairagi* and, during his absence on pilgrimage, his property was in another's possession, in a suit by him on his return from pilgrimage to recover his property, the question for decision was whether the possession of that other was adversely to, or in trust for, the owner. 1 B.L.R.A.C. 114 - 10 W.R. 172.

(30) Suit for property under an award:—

A suit for the recovery of immoveable property under an award, is governed by this article. 23 M. 593.

(31) Ancestor barred—Heir barred:—

If the plaintiff's ancestor was barred in asserting his right to succeed to a Zemindari, the heir would be equally barred. 17 M. 34 - 3 M.L.J. 250.

Scope of article.—(continued).

(32) Suit for endowed property :—

- (a) Where property endowed to perpetuate the worship of a household idol was sold in execution of a decree, a suit by the trustee to recover the property was governed by the 12 years' limitation. 9 B. 169.
- (b) A suit by the presiding *lingayat* priest of a *Math* to recover possession of lands alienated by his predecessor in office, on the ground that the *math's* lands were inalienable, brought within 12 years of the death of such predecessor, was not barred. 10 B. 34.
- (c) Suit brought by the trustee of a temple to set aside an alienation of trust property by way of lease is governed by this article, if the original lessor was not the trustee of the temple. 27 B. 373=5 Bom. L.R. 241.
- (d) Where the manager of a *math* sold the *miras malki* of certain lands appertaining to the *math*, a suit by a successor in office to recover possession of the lands brought more than 12 years after the death of the vendor was barred, the circumstance that, during the interval between the death of the vendor and accession of the plaintiff, there was no lawful manager not saving limitation. 18 B. 507.
- (e) In a suit by a trustee of a Malabar *Devasom* to recover for the *Devasom* possession of the land demised on *kanam* by his predecessor, the defence was that the defendant had been in possession for more than 12 years asserting the title of *kanohdar* with the permission of the plaintiff's predecessor. *Held*, that the suit was not barred by limitation. 13 M. 402.
- (f) In a suit by a *dharmakarta* disaffirming the acts of his predecessor, time begins to run from the date of the plaintiff's accession to the office. 13 M. 277.

But compare 23 M. 271 (F.C.)=27 I.A. 60. at p. 1087, *infra*.

(33) Suit for partition against mortgagee :—

A suit for partition against a mortgagee of joint property, who has been in adverse possession for more than 12 years, is barred by limitation. 3 P.L.R. 1902.

(34) Suit by *Patwari* :—

The limitation for a suit by a *Patwari* to recover possession of certain land belonging to village service holding, must be brought within 12 years from the date of his appointment as *Patwari*, since the possession of defendant became adverse only from the said date of appointment. 9 C.P. 203.

(35) Suit for revival of easement over water-course :—

The period of limitation for a suit to revive a right of easement over a water-course, enjoyed continuously for more than the prescriptive period and interfered with by defendant by diversion of water to his own fields, must be brought within 12 years from date of obstruction, being of the nature of continuing nuisances. 4 C.P.L.R. 16 [following G.C. 394 (P.C.).]

Scope of article.—(continued).

(36) Suit for land wrongfully taken :—

A suit for possession of immovable property wrongfully taken by defendant must be brought within 12 years from date of such illegal seizure. 3 C.P.L.R. 102.

(37) Distinction between this article and article 148 :—

A suit for recovery of land is governed by this article and when plaintiff's claim was only conditional, on payment of a sum of money, it is governed by art. 148. U.B.R. (1897-1901), 446 (referring to 10 M. L.J. 208).

(38) Non-participation of profits :—

Plaintiff and defendant became entitled to share property of their parents, 13 years prior to suit. A suit by plaintiff to share in the land in possession of defendant was barred by limitation, plaintiff having received no benefit from the land. L.B.R. (1903), 184.

(39) Suit for possession on allegation of trust :—

See 97 P.R. 1890——. No. 7, p. 1053, *supra*.

(40) Suit based on relation of urulan and pattamall :—

See 3 M.L.J. 213 (Case No. 2 at p. 241, *supra*).

(41) Suit for management of trust property :—

A ——— is governed by art. 124 and 124, time commencing to run from the date of possession of defendant or his predecessor in title adversely to plaintiff. A.W.N. (1905), 69; 2 A.L.J. 304. Current Index, Limitation Act, arts. 124 and 124.

B.—Suits not falling within the article.

(1) Suits involving the setting aside of deeds :—

(a) This article is inapplicable to a suit where the cancellation of an instrument or a declaration of its invalidity is the substantial relief sought for and the recovery of land is only an auxiliary or incidental relief in it. 25 A. 1 (P.C.) = 4 Bom. L.R. 832 = 6 C.W.N. 849.

(b) A suit for possession by setting aside a deed is not necessarily one falling under this article. Such a suit is one falling under art. 91. 15 C. 58 = 14 I.A. 148 (P.C.).

(c) If the transaction is void and void so far as the plaintiff (a ward) is concerned, the possession of the property is null and void and non-existent, and may avail the plaintiff. 1 B.L.R.A.C. period of limitation of 12 years in bringing a suit for recovery of the property under an award cannot recover possession without setting it aside or the recovery of immovable property of cases art. 44 will not, and to the latter this article. 23 M. 593.

(d) or barred—Heir barred :— A minor is void. Where such a contract is made by a Court, the minor is not even bound to return the property to the ancestor or to him under it. The minor need not seek a declaration of the contract. 30 C. 539 = 7 C.W.N. 441 (P.C.) 250.

Scope of article.—(continued).

B.—Suits not falling within the article.—(continued).

- (e) An alienation, which is void, so far as the interests of the plaintiff in the alienated property are concerned, need not be set aside. The plaintiff may recover the property on the ground of his title by availing himself of the longer period of limitation allowed by this article. To such a suit, art. 44 will not be a bar. 12 C. 69 (following 6 I. A. 110).

(2) Suits for pre-emption:—

- (a) This article does not apply to suits for pre-emption. 5 C.W.N. 888.
- (b) This article is inapplicable to a suit to recover possession of immoveable property where the suit is for pre-emption and the subject-matter of the suit does not admit of physical possession. 24 A. 17 (P.C.) = 5 C. W.N. 888.
- (c) A suit to declare a right of pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is governed by art. 120 and not by this article. 3 Bom. L.R. 707.

(3) Suits by reversioners:—

- (a) The article is inapplicable to a suit by a reversioner brought after the widow's death to contest an alienation made by her as being without necessity, it being governed by art. 141. 110 P.R. 1892.
- (b) Where a Hindu widow who was, under an arrangement with her husband's family, in possession of certain of her husband's ancestral estate for life alienated the property, a suit by the reversioners on her death to recover it from the alienees would not be governed by this article and would not be barred. 8 C. 224 = 8 I.A. 210 (P.C.).
- (c) A suit by a reversioner to recover possession of property gifted away by a deceased sonless proprietor, would lie at any time within 12 years from the date of the donor's death, the suit for a declaration of invalidity of the alienation being unnecessary in such cases. 93 P.L.R. 1903 = 56 P.R. 1903 (F.B.).
- (d) Held, that, in the Punjab, adverse possession by a trespasser as against a widow during her life cannot be adverse against a reversioner, and a suit by the latter to recover property is governed not by this article but by art. 141, the cause of action accruing from the death of the widow and not from the commencement of such adverse possession. 41 P.R. 1904.

See, further, cases under art. 141, *supra*.

(4) Suits on mortgages.

- (a) A suit for foreclosure or sale, based on a mortgage by conditional sale, is governed by art. 147 and not by this article. 16 M. 64.
- (b) Art. 148, and not this article, relates to a suit for redemption of mortgage. 1 P.L.R. (1900), 167.

(5) Transfer of land by avulsion:—

According to the custom of the *Bias*, the transfer of land
river to another by a sudden change in the

side of the
iver, or by

Scope of article.—(concluded).

B.—Suits not falling within the article.—(concluded).

what is called "avulsion," cannot affect the proprietary right. And where, at the time of such transfer, the plaintiff was dispossessed of the land, a suit to recover possession was governed by art. 142. 84 P.R. 1889.

(6) Suit by minor on coming of age:—

If the cause of action has arisen during minority of a person entitled to sue, he must sue within three years of his attaining majority. Otherwise, his suit will be barred. 88 P.R. 1897. Cf. 24 M. 387 (P.C.) at p. 1086, *infra*.

(7) Endowed property—Suit against assign of last manager:—

A suit by a person interested in an endowed property for dispossession of an assign of the last manager, is not a suit for possession within the meaning of art. 142 or this article, but a suit for a declaration of the right of the third person, and, as such, was governed by art. 120. 8 P.R. 1899.

(8) Suit on allegation of possession and dispossession:—

A suit to recover possession of certain land on the allegation that the plaintiff had bought the land and obtained possession thereof and his possession was obstructed by the defendants, was governed by art. 142 and not by this article. 14 B. 458.

(9) Suit involving the setting aside of an award:—

See U.B.R. (1892-96), 475——No. 6 at p. 1058, *supra*.

I.—'Possession.'

(1) Possession, meaning of:—

—implies actual physical possession or detention in technical language. It implies not only a fact but also an intention (i.e.) not only the fact of the thing being under the control of the possessor but also the intention on the part of the possessor to hold it so as to reap exactly the same benefit from it as the real owner would, and to exercise the same rights over it, even though he may be well aware that he is not the real owner and has no claim to be so. 8 A. 24 (at p. 31).

(2) Possession as defence:—

- (a) Possession, though without title, can be set up in defence of a suit. 9 W. R. 124.
- (b) See, 21 M. 53, No. 6 at p. 1052, *supra*.
- (c) See, further, cases under the heading 'Possession' under art. 142. at pp. 105 to 1065, *supra*.

(3) Effect of symbolical possession:—

- (a) Where a lease purports to be a perpetual lease without reversion to the grantors, and no rights reserved to them, but only a nominal rent, symbolical possession as against the grantors would not save limitation as against the lessees. 18 C. 520.

1.—'Possession.'—(concluded).

- (b) A suit by the auction-purchaser of the rights of a sharer in a *mouzah*, who had obtained merely symbolical delivery against the prepetual lessee of the property, would be barred if not brought within 12 years from the date of the lease. 18 C. 520.
- (c) Where the purchaser of certain lands at a Court-sale obtained only symbolical possession thereof, a suit brought by him to recover possession of the property more than 12 years after the purchase was barred by limitation. 2 Bom. L.R. 407.
- (d) As against the judgment-debtor, the formal delivery of possession to an auction-purchaser amounts to an actual possession. 103 P.R. 1884; *cf.* 25 B. 358.
- (e) This article relates to a case where the formal possession of an auction-purchaser has been disturbed by the judgment-debtor or his assigns continuing in possession. 2 Bom. L.R. 1021.
- (f) Adverse possession for more than 12 years is a sufficient defence against an auction-purchaser, who had merely obtained symbolical possession. 16 B. 722.
- (g) As between judgment-creditor and judgment-debtor, or their representatives, symbolical possession is as good as actual possession. Purchaser can sue for possession within 12 years from the date of symbolical possession. 25 B. 358.
- (h) An auction-purchaser at a Court-sale, who has obtained symbolical possession, or his assigns, may sue the judgment-debtor for actual possession within 12 years from the date of obtaining such symbolical possession. 25 B. 275.
- (i) Where, notwithstanding a decree against defendant for possession and symbolical delivery of possession to plaintiff (the defendant's plea of permanent tenancy being found against him), the defendant continues in possession asserting a right of permanent tenancy, such possession will be adverse and plaintiff will have to sue within twelve years from the commencement of such adverse possession. 9 C.W.N. 292. (Current Index, Landlord and Tenant).
- (j) See cases under the same heading under art. 142. 7 C. 418; 10 C. 993.
- (k) See under arts. 137 & 138 at p. 1012, *supra*.
- (l) See 24 C. 715—Case No. 2(e) at p. 1012, *supra*.
- (m) See 23 C. 536—See No. 8 at p. 998, *supra*.

2.—'Immoveable property.'

(1) *Toda Giras Hak*:—

- (a) Right to a *Toda Giras Hak* is an interest in immoveable property. 13 B. L.R. 254=10 B.H.C. 281=21 W.R. 178=1 L., 84 (P.C.)
- (b) *Toda Giras* allowance is not immoveable property. 4 B.H.C.A.C. 189.

(2) *Tree*:—

- (a) Standing tree is immoveable property. 19 B. 207.
- (b) A suit for possession of a tree is governed by this article and not by art. 55, as the tree, being attached to the earth was, until, 'immoveable property' within the definition of Act I of 1868. 112 P.R. 1884; 19 B. 207.

2.—'Immoveable property.'—(concluded).

(3) Grant of allowance:—

A suit to recover certain allowance endowed by the Poishwa to be paid out of the revenue derivable from certain forts etc., and stopped by the British Government, after some time, fell under s. 1, cl. 12, as the grant was of the nature of immoveable property—*per* SAIGENT, J. *Per* MELVILLE, J.—The suit did not fall under s. 1, cl. 12, as the allowance was not immoveable property. 5 B. 322.

(4) Profits of a kul or water-course.

A suit relating to an account of the income and expenditure of a *kul* or water-course jointly excavated by the parties, is a suit relating to immoveable property, and is governed by this article or art. 142. 57 P.R. 1898.

(5) Right to manage saranjam lands.

A right to possession and management of certain *saranjam* villages being an interest in immoveable property, a suit to recover the possession and management thereof will be barred if the defendant proves adverse possession for more than 12 years. 15 B. 247.

(6) Right to officiate as priest:—

A right to officiate as priest at funeral ceremonies is in the nature of immoveable property. 10 C. 73 = 13 C.L.R. 263.

(7) Right to fish:—

(a) A ——— in waters, which cover land belonging to another, is not immoveable property within the meaning of S. 9 of the Specific Relief Act, immoveable property intended to be dealt with by that section being something of which actual physical possession can be given and taken. The words cannot include incorporeal rights. 19 C. 514 (F.B.) [PRINSEP and PICOTT, JJ., *dissenting*].

(b) Compare 20 C. 446, which decides that a *jalkar* or right of fishery, as being a benefit arising out of land covered by water, comes within the definition of 'immoveable property' in the General Clauses Act (I of 1868) and is therefore immoveable property under S. 106 of the Transfer of Property Act.

On this point *see*, also, 5 M.L.J. 95. 13 M. 54; 12 B. 221.

3.—'Or any interest in immoveable property.'

(1) A suit for possession of mango trees growing on the land of plaintiff is a suit for an interest in immoveable property. 16 B. 353.

(2) A suit for declaration of plaintiff's right to lands and to have their names registered in the Revenue records, is not a suit in respect of an interest in immoveable property so as to fall within this article. 19 B. 43.

(3) A hereditary office is immoveable property or an interest in immoveable property. 9 B.H.C.A.C. 99.

(4) Grant of an allowance for the support of a Hindu temple is an interest in immoveable property. 6 B. 546.

3.—‘Or any interest in immoveable property.’—(concluded).

(A) Suit for properties attached to office :—

- (1) A right to the land which is only secondary, and dependent on, a right to an office, is not governed by this article, as it is not a suit for possession of immoveable property within the meaning of this article. 26 M. 113.
- (2) A claim to an emolument of an hereditary office, is not one for the possession of an interest in immoveable property, and is not governed by this article. 22 M. 351.

(B) Easement :—

A right to an easement is an interest in immoveable property. A suit to recover such a right will be governed by this article. 5 M. 253 (255).

(C) Jalkar :—

A *jalkar* is an interest in immoveable property. 3 C. 276 = 1 C.L.R. 592.

(D) Profits of a water-course :—

See 51 P.R. 1898, No. 2, at p. 1051, *supra*.

4.—‘Not otherwise provided for.’

Case in which it was held that art. 127, which was sought to be applied by plaintiff to her suit, being inapplicable, it was held that this article was applicable. 18 C. 642.

5.—‘Adverse Possession.’

(General).

(1) —Definition :—

- (a) There can be adverse possession only when possession is with a person claiming as of right by himself or by persons deriving title from him. If the possession comes to an end by *vis major* (e.g., submergence of the land), the constructive possession rests not with the trespassers, but with the true owner. 4 Bom. I.R. 537 = 29 C. 578 = 29 I.A. 104 (P.C.)
- (b) Possession must be in some way or other ostensibly adverse before it can cause limitation to run, and when there is no actual deprivation of any right, there must be a manifest and known assertion of a title incompatible with that of the *disseizer*. 4 Bom. I.R. 721.

(2) —Original possession being friendly :—

When once a friendly relationship is established (e.g.) that of a mortgagor and mortgagee, that relationship will continue unless and until something is done to render such possession hostile. 2 M.H.C. 382.

—Tacking :—

- (a) The possession of one trespasser could not be added on to that of another so as to complete one's title by adverse possession. 2 C.W.N. 315.
- (b) A mortgagee from a trespasser cannot tack his own possession to that of his mortgagor (a trespasser) in computing the period of twelve years as against the real owner. 189 P.R. 1889.

5.—'Adverse possession.'—(continued).

(General).—(continued).

(c) A person can tack on the period of his own adverse possession to that of his predecessor in title as against one who has merely obtained symbolical possession of the property. 19 B. 620.

(4) —Cause of action:—

The cause of action arises, in cases of adverse possession, when the adverse possession commences. 5 C. 692=5 C.L.R. 505.

(5) —Nature of proof:—

A defendant pleading adverse possession must prove to the satisfaction of the Court, that his possession has been unmistakably in his own right and to the exclusion of the plaintiff. 5 A.W.N. 51.

(6) Commencement of—Judicial determination of title:—

Where the claim was for possession of an alluvial land, and there was a judicial determination of the area of the land and the plaintiff's title thereto, and the plaintiff's suit was instituted within 12 years of such judicial determination, it was held that adverse possession commenced only after that date and that the suit was in time. 19 C. 159 (P.C.)=18 I.A. 105.

(7) Extinction of title:—

(a) As between private owners, more than 12 years' adverse possession not only bars the actual owner, but creates a prescriptive title in the possessor. 16 P.R. 1890.

(b) Once there is adverse possession for more than twelve years, the plaintiff's rights would be extinguished. The mere circumstance of transfer of rights or supposed rights can't give a fresh start of limitation. 17 W.R. 377.

(8) —Extinction of equity of redemption:—

An equity of redemption may, in the case of a usufructuary mortgage, be extinguished by adverse possession on the part of a stranger while the mortgagee continues in possession and the period for redemption is still running. 6 C.W.N. 601.

(9) —Persons under disability:—

If a person under disability when the cause of action arose, does not sue, within three years of the cessation of the disability, to enforce his rights, his rights would be extinguished. 24 M. 387 (P.C.)=28 I.A. 81=8 Bom. L.R. 303.

(10) —Commencement of time:—

(a) A suit for possession should be brought within 12 years of the date when the possession of the defendant became adverse. 6 C. 725=8 C.L.R. 90.

(b) A suit for recovery of possession of certain land, if brought within 12 years from the time when there was any necessity or duty lying upon the plaintiff to assert his rights in those lands against the persons in possession, would be in time. 5 C. 644=6 C.L.R. 71=7 I.A. 1 (P.C.)

B.—'Adverse Possession.'—(continued).

A.—(General).—(continued).

- (c) Where a *puttah* was executed in pursuance of a decree enforcing specific performance of an agreement to let lands on lease, in a suit by the decree-holders or their assignees to recover possession of the lands, the period of limitation will be computed from the date when the *puttah* was actually granted. 19 C. 646.
- (d) The cause of action for a suit by a purchaser, whose application to have his transfer registered was refused by the Zemindar, arose from the date of such refusal, and not from the date of the purchase. 20 W.R. 125.
- (e) Where a decree of Court establishes the sub-proprietary right of a person thereby entitling him either to a settlement or sub-settlement, it gives a start to adverse possession as against the whole world including any one claiming to be *talukdar* or superior proprietor of the same estate. The *talukdar's* suit, therefore, brought more than 12 years from the date of such decree, will be barred. 23 C. 487 = 23 I.A. 8 (P.C.)
- (f) See 14 C. 323, No. 7 at p. 1023, *supra*.

(11) —Benamee transactions:—

- (a) The article is applicable to a suit for the recovery of immoveable property against a *benamee* purchaser denying the title of the real purchaser. 7 A.W.N. 91.
- (b) In a case of *benamee* purchase in execution by defendant and possession thereunder in trust for plaintiffs, adverse possession will commence against the plaintiff only when the defendant disavows the trust. 1 A. 403.

(12) —Possession of part:—

Occupation by a wrong-doer of a portion of a land cannot be held to constitute constructive possession of the whole so as to enable him to obtain a title by limitation. 31 C. 397.

(13) —Possession by a fluctuating body of persons:—

Acts at different times by a fluctuating body of persons do not amount to adverse possession, to constitute which, the possession must be adequate in continuity, publicity and extent. 31 C. 397.

(14) —Limited interest:—

Under this article, the defendant's possession must be shown to be adverse; if the possession be adverse to a limited extent and not absolutely, it can operate as a bar to that limited extent. 5 Bom. L.R. 186.

(15) —of a right:—

The adverse possession of a right may be entirely distinct from the adverse possession of tangible immoveable property; a right to sue in respect of the former arising possibly on open and avowed assertion or manifest adverse exercise of such right; while the right to sue for possession can commence only when the possession itself (and not a mere

5.—'Adverse possession.'—(continued).**A.—(General).—(continued).**

claim to some minor right) becomes adverse to the rights of the person alleging title, which it cannot be as long as that person is not entitled to claim possession. 4 Bom. L.R. 731.

(16) —As against Government:—

Possession, by Court of Wards managing a Zemindari, in the mistaken belief that certain hill tracts belonged not to the Government but to the Zemindar, Ward of Court, such possession being acquiesced in by Government officials also under a mistaken belief that the property did not belong to Government. *held* not adverse to Government. 9 C. W.N. 553 (P.C.) (Current Index, Hill Tracts).

(17) Adverse possession, what constitutes—Forest lands:—

In the case of forest lands, cutting wood, gathering forest produce and pasturing cattle under the belief and assertion that the tracts whereon the above acts were exercised formed portion of plaintiff's Zemindari estate, were *held* to be evidence of adverse possession. 9 M. 285.

(18) Adverse possession—Effect of attachment:—

The attachment of a property by a decree-holder does not arrest the running of time in favour of a trespasser holding the property adversely to the judgment-debtor, nor prevent the acquisition of title by prescription. 11 M.L.J. 344.

(19) Adverse possession—Lands of a religious endowment:—

(a) The hereditary manager of a religious endowment sold lands belonging to the endowment as well as the right of management. The vendee enjoyed the lands for more than 12 years during the life-time of the vendor. The son of the vendor sued after death of his father for the office as well as the lands sold. The Privy Council *held* that there was no distinction between the claim to the office and the claim to the lands, both being governed by art. 124 and that, if there were any distinction, this article would apply to, and bar, the claim to the lands. 23 M. 271=27 I.A. 69 (P.C.) [reversing 19 M. 248].

(b) Possession of lands of a religious endowment held adversely to a predecessor in office for more than 12 years, would bar also the successor. 23 M. 439.

(20) Possession as between members of a Joint Hindu family:—

Where the plaintiff's father and defendant's father were brothers, of whom the former predeceased the latter, leaving the plaintiff a minor, and the whole family property remained in the possession of the defendant for more than 12 years after the death of his father, a suit to recover the whole property or the plaintiff's share in it, instituted within 12 years after the death of the defendant's father, was barred, so far as the plaintiff's claim to recover more than his own share in the property was concerned, and was not barred so far as the plaintiff's share was concerned. 4 Bom. L.R. 135.

8.—'Adverse possession.'—(continued).

A.—(General).—(continued):

(21) **Adverse possession—Joint family property—Widow's possession:—**

The widow's possession of a Hindu joint family property may be presumed to be with the consent of the members. But if the widow is in undisturbed possession of such property for a length of time without the consent of the members of the family, and not on account of her maintenance, her possession will be adverse to the members of the family. 8 A.W.N. 133; 7 A.W.N. 43.

(22) **—Joint Hindu family—Possession of father:—**

So long as the family property remains in the father, under such circumstances as to be on behalf of the son, adverse possession does not arise. It commences only when it passes into the hands of strangers to the family. 27 B. 31.

(23) **Joint family property—Non-participation:—**

Mere non-participation of profits and absence would not constitute adverse possession. 11 B. 365.

(24) **—Joint family against individual members:—**

Where lands, granted to one of two brothers of a joint Hindu family, were held by the joint family adversely to the individual interest of the grantee and his son, held, by the Privy Council that the grantee and his son had lost their rights. 24 M. 387 = 28 I.A. 81 (P.C.)

(25) **Possession among Hindu co-widows:—**

As between Hindu co-widows, the possession of one would not be adverse to the other, especially when the latter is in receipt of a maintenance allowance from the former. 12 W.R. 158; 3 B.L.R.A.C. 289.

(26) **Jungle lands—Possession follows title:—**

In the case of jungle lands, in the absence of proof of exercise of acts of ownership on either side, possession must be presumed to have continued with the person to whom they rightfully belong. 16 W.R. 102.

(27) **—Possession follows title:—**

Lands of such a nature and description, as that no one can be said to be in possession of, may be presumed to be with the parties with whom the title rests. 24 W.R. 410.

(28) **Khoti lands—Decision of Survey Officer:—**

Decision of Survey Officer as to nature of tenure does not affect limitation, but it begins to run from the date of preparation of *botkhat*. 24 B. 426 = 2 Bom. L.R. 228.

(29) **Khoti lands—Commencement of time against purchaser:—**

In the case of a purchaser of a share in a *khoti*, who was kept out of possession by the other sharers, limitation begins to run against him from the date of his purchase. 24 B. 104.

5.—Adverse possession.—(continued).

—(General).—(continued).

(30) —Nature of property:—

It is of the essence of a title by adverse possession that it must relate to some property which is recognised by law. 6 Bom. L.R. 428.

(31) Small piece of land:—

Mere use of a small piece of defendant's land for fixing the plaintiff's ladder upon is not adverse possession, and such use, even if it existed beyond twelve years, would not give a prescriptive title to the plaintiff. 68 P.R. 1899.

(32) Husband's possession not adverse to wife:—

Where a husband living with his wife remained in possession of, and managed, his wife's property, his possession of such property was considered to be his wife's. 24 W.R. 274.

(33) As between Mahomedan co-heirs:—

(a) Where—the eldest son was left in possession by an agreement of compromise by all co-heirs confirmed by Court's decree, a suit by the purchaser of the right, title and interest of one co-heir, brought within 12 years from the date of the decree, *held* not barred. 3 B.L.R. 75=11 W.R. 29 (P.C.)=12 M.I.A. 366.

(b) In a suit by a Mahomedan lady to recover her share of the family property in the hands of her brother, the latter must show that he was holding adversely to his sister for more than 12 years before suit. 1 A.W.N. 113.

(34) Possession as between co-sharers:—

(a) Possession or occupation of joint property by one co-sharer does not constitute adverse possession against any other co-sharer, until there has been a disclaimer of the latter's title by open assertion of a hostile title of the former. 9 C.W.N. 774; 21 M. 153, 166; 31 C. 970; 25 W.R. 53.

(b) When one co-sharer sets up adverse possession against another, it is for him to show that he had held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to them. 1 C.L.R. 155.

(c) The possession of defendant, a co-sharer with plaintiff, of *sur* land attached to an undivided *mahal*, was *held* not adverse to plaintiff, when the defendant did not repudiate the title of plaintiff or set up any adverse title within 12 years prior to suit. A.W.N. (1906), 15. (Current Index, Adverse possession.

(d) Exclusive possession by one co-sharer, of property originally joint, does not *per se* amount to adverse possession as against the others. The Court should see whether such exclusive possession could not be accounted for by the fact of some arrangement having been come to at a previous time between the parties. 1 C.L.R. 864.

5.—'Adverse possession'.—(continued).

A.—(General).—(continued).

(35) —Village co-owners:—

Where, there being a custom in a village of re-distributing the lands among the co-owners in the village community periodically, the question of limitation was raised in a suit for such re-distribution, held, that a judgment in a similar suit within 12 years prior to the present suit, recognising the existence of such custom, was sufficient to keep the claims of the plaintiff alive. 2 M.H.C. 1.

(36) Possession of joint owners:—

- (a) Where two sisters jointly inherit certain property and one of them is in actual possession of the whole, the other residing abroad and occasionally visiting the property in the possession of the other only as a guest, the possession of the other will not be adverse unless she asserted an exclusive title thereto to the knowledge of the absent sister. 1 C.W.N. 774.
- (b) Where *dhurumter* lands were registered in the joint names of the plaintiff and defendant, the entry was a declaration of at least joint title such as nullified a plea of bar by limitation. 16 W.R. 42.

(37) —Tenants-in-common:—

- (a) As between tenants-in-common, the possession of one is not adverse to the other, unless the former holds for more than 12 years in denial of the rights of the latter, such denial being to the latter's knowledge. 21 M. 153 = 8 M.L.J. 92.
- (b) An ejectment suit cannot be maintained by one tenant-in-common against another. To constitute an adverse possession, as between tenants-in-common, there must be an exclusion or an ouster. 5 Bom. L.R. 742.
- (c) To constitute adverse possession among—there must be an exclusion or an ouster. Exclusive receipt of profits by one tenant-in-common for a long period is presumptive evidence of ouster or exclusion. 7 Bom. L.R. 252. (Current Index, Adverse Possession).

(38) Adverse possession as against taluqdar:—

The mere circumstance that land situated in one village within a taluq was used by the neighbouring villagers as a grazing common for the pasturage of their cattle, could not cause limitation to run against the taluqdar, as if he were out of possession. 20 W.R. 285.

(39) —Cessation from enjoyment:—

Where certain Inam lands and cash allowance paid to plaintiff were attached by Government, which subsequently withdrew the same, and plaintiff, after the relief of the attachment, did not enjoy the lands or allowance for more than 12 years, a suit for the lands after that period held barred. 11 B. 222.

(40) —Waste lands:—

- (a) In the case of waste lands, the cutting of grass and grazing of cattle are ordinarily acts by which possession is asserted. 31 C. 397.

5.—'Adverse possession.'—(continued).

A.—(General).—(continued).

- (b) In the case of purchase of waste and unoccupied land, the purchaser need not, in a suit for possession by him, prove his vendor's possession within 12 years prior to suit; but he must sue within 12 years of the possession becoming adverse to him. 49 P.R. 1884.
- (c) In the case of uninhabited or uncultivated lands, the presumption is that possession follows title. Very slight evidence of possession will, for purposes of deciding questions of limitation. 3 C. 768 = 2 C.L.R. 84.
- (41) **Vacant land—Temporary occupation:—**
 User of another's vacant land by way of temporary occupation or encroachment, does not constitute adverse possession thereof. 16 B. 338.
- (42) **Lands attached to office of karnam:—**
 Where the descendants of one of two *karnams* in a Zemindari village held the whole of the lands attached to the office of both the *karnams* as private property for more than 12 years, without any attempt either on the part of the co-*karnam* or the Zemindar to re-attach the same to the office, the claims both of the Zemindar and the co-*karnam* were held barred by reason of the adverse possession of the holder. 7 M.L.J. 54.
- (43) **Service Inam lands—Non-performance of service.**
 To make the holding of a service Inam adverse, there must be refusal to perform service or a claim to hold the lands free of service. Mere non-performance of service is not sufficient. 23 B. 602 = 1 Bom. L.R. 60.
- (44) **Presumption:—**
 Where a female lives with her male relatives, the presumption is that they manage her property for her, and do not hold adversely to her. 13 C. L.R. 328.
- (45) **Unregistered purchaser:—**
 If a person purchasing under an unregistered sale-deed remains in possession for more than 12 years, he perfects his title thereto. He cannot be affected by a subsequent purchaser under a registered sale-deed. 23 B. 37 = 9 M.L.J. 258.
- (46) **Defendant holding from Government:—**
 In a suit for possession of land, which, at one time, undoubtedly belonged to him, it was found that the defendant had held the land for more than 12 years under a *Cowle* from the Government. *Held*, the possession of the defendant was adverse to the plaintiff and the suit barred. 169.
- (47) **—against official assignee:—**
 A suit by an official assignee held barred by reason of possession for more than 12 years in the widow of the insolvent under a conveyance before insolvency. 4 W.R. 103 (P.C.) = 6 M.I.A. 494.

B.—'Adverse possession.'—(continued).

A.—(General).—(continued).

(48) Adopted son's suit against alienees from adoptive mother:—

The cause of action for a suit by an adopted son to recover property alienated by his adoptive mother before the date of his adoption, did not accrue until the date of adoption, when the possession of the alienee became adverse to him. 19 B. 809.

(49) —Ghatwal and under-tenure-holder:—

Where there is nothing to show that the possession of the under-tenure-holder was adverse to the *ghatwal* for more than 12 years before suit, a suit for ejectment by the latter would not be barred by limitation. 12 C. 484 = 12 I.A. 188. (P.C.)

(50) Suit based on award:—

If an award of arbitration grants possession, and neither of the parties were in possession at that date, a suit by the person in whose favour the award is passed for possession against a stranger in possession for more than 12 years would be barred, though it is within 12 years from the award. 1 A.W.N. 170.

(51) Abandonment by Hindu widow—Suit by daughter:—

A Hindu widow first contested a will by her deceased husband, but subsequently admitted the rights of the devisee, abandoning her own rights. The cause of action for a suit by the daughter to set aside the father's will was held to arise only on the widow's admission of the rights of the devisee. 8 W.R. 323.

(52) Suit for accretion:—

A suit to recover an accretion must be brought within twelve years from the formation of the same and the possession thereof by another person on adverse title. 7 W.R. 457; 89.

(53) Suit for partition:—

In a suit for partition, the possession of the defendant for more than 12 years would prevail, if the plaintiff does not prove that the property in which he seeks to recover a share is 'joint property.' 9 C. 237.

(54) Suit to recover *malikhana*:—

Where *malikhana* was in deposit with the Collector, in consequence of the refusal of the proprietors to make settlement, and was not claimed by the proprietors for more than twelve years, the proprietors lost their right to recover it. 22 W.R. 520.

—Diluviated land:—

(a) Diluviated lands re-forming on their original site, remain the property of their original owner. 18 M.I.A. 467 = 5 B.L.R. 521 (P.C.).

(b) But this doctrine does not hold good where after re-formation an indefeasible right has been acquired by adverse possession for more than 12 years. 3 C. 796 = 1 C.L.R. 259 (P.C.).

5.—'Adverse possession.'—(continued).

A.—(General).—(continued).

(56) Occupied lands :—

In cases of lands occupied, the question of possession must be treated as distinct from the question of title, for the title may be in one person, and more than 12 years' adverse possession may be in another. 3 C. 768 & C.L.R. 964.

(57) Guardian or manager and ward :—

The possession of a manager would not become adverse as against his ward until he distinctly repudiated the management. 17 B. 755.

(58) —Lambardar and co-sharer —

A lambardar not being a trustee of the shares of the co-sharers, he may obtain adverse possession of the share of a co-sharer by withholding and appropriating the profits thereof. 1 A.W.N. 26. But see, 2 A.L.J. 107 & A.W.N. (1906), 36.

(59) — Declaration of title —

A declaration of title may be made on the strength of more than 12 years' adverse possession, but such declaration cannot be made on a title not distinctly set forth in the plaint or the issues. 2 C. 418 (following 20 W.R. 104).

(60) —Void bequests —

Where a will makes a void residuary bequest and the executor takes possession thereunder, his possession will, from the commencement, be adverse to the heir-at-law, and the latter will be barred unless the suit is brought within 12 years from the executor's taking possession. 4 C. 448.

(61) —Abandonment by Government.—

Where lands are confiscated by Government as an act of state, and then abandoned, the question of adverse possession and limitation must be treated as if there were no confiscation at all. 4 C. 727 (P.C.)—C.I.A. 76.

(62) —Right to fish :—

If defendant had been fishing in water for more than 12 years adversely to the plaintiff, the latter's suit for declaration of his title would be barred. 3 C. 276—1 C.L.R. 592.

(63) —Grant by wife :—

A grantee, from a wife, of land belonging to husband, can acquire a title by prescription against the husband; if he continued in possession for more than 12 years against the husband. His position is that of a tenant, because the wife has no power to make a grant. 327.

(64) Vendor's possession after sale :—

- (a) The possession of a vendor after a sale is adverse to the vendee. A suit by the vendee against his vendor and a purchaser of the latter's interest under a subsequent Court-sale would be barred by the possession of the vendor and the auction-purchaser together occupying a period of more than 12 years. 16 B. 197.

3.—*Adverse possession.*—(continued).

A.—(General).—(continued).

- (b) The possession of a vendor after the execution of a sale-deed by him is adverse to the purchaser. If the purchaser, therefore, does not bring his suit for possession within 12 years from the date of sale, he will be barred. Delay in registration of the sale-deed does not stop the running of time. 11 C. 229.

- (c) A vendor under a deed of conditional sale becoming a tenant of the vendee, held over after the period fixed in the deed of conditional sale. Held, the possession of the vendor was not adverse to the vendee. 19 M. 437.

(65) —*Diluvion—Re-formation of old site:—*

Where, in the case of land re-formed, after diluvion, on an old site, the defendant relies on a prescriptive title by adverse possession, the plaintiff ought to prove that the defendant has not been in possession for more than twelve years prior to suit. 4 C.L.R. 390.

(66) —*Fishery:—*

Where a person fishes in a tank adversely to the owner for over 12 years, he acquires an absolute and indefeasible title to fish as against the owner. 3 C.L.R. 509.

(67) *Possession of executor against heir-at-law:—*

Where a residuary bequest is void and the executor takes possession of the property covered by such bequest, such possession of the executor is adverse to the heir-at-law entitled to succeed as on an intestacy, and the suit by the heir will be governed by this article. 2 C.L.R. 112.

(68) *Trespasser's putnidar's possession:—*

The possession of the *putnidar* of a trespasser will be adverse to the real owner, if such possession and the possession of the trespasser, who created the *putni*, covered a period of more than twelve years. 1 C.L.R. 531.

(69) *Suit by son against alliance of step-mother:—*

Where *vatan* property was alienated by a widow of the deceased owner thereof, a suit by the son of the owner by another wife to recover possession of the property free of incumbrance, instituted beyond the time allowed by law after his attaining majority, was barred, the possession of the widow being that of a trespasser. 18 B. 22.

(70) *Suit by son barred—Reversioner not barred:—*

Adverse possession as against a female heir will not cause limitation to run against the reversioner. 2 Bom. L.R. 106.

(71) *Suit by son barred—Reversioner barred:—*

Adverse possession against the owner bars the reversioner even though the owner is a female. 14 B. 317.

(72) *Suits by reversioner when the female heir is barred:—*

See, Cases under (71) whether reversioner is barred if female heir is barred. 10 to 100 (both inclusive), *supra*.

5.—'Adverse possession.'—(continued).

A.—(General).—(concluded).

(78) **Ratan lands :—**

- (a) The adverse possession of—during the life time of one holder will bar a succeeding *ratan* even though he is a minor at the time of his succession. 7 Bom. L.R. 135; 9 B. 198.
- (b) Where a grant of *ratan* lands by plaintiff's father was invalid, a suit by the plaintiff against the grantees, within 12 years from plaintiff's father's death, held not barred, adverse possession commencing only from the death of the plaintiff's father. 12 B. 80.

B.—Burden of proof.

(1) **Burden of proof :—**

- (a) If, in a suit for possession, adverse possession is pleaded in defence, plaintiff ought to prove possession and dispossession within 12 years prior to suit. 105 P.R. 1901.
- (b) In a suit for possession of immoveable property falling within this article, plaintiff must, *prima facie*, establish a subsisting title not barred by limitation, before the defendant can be called upon to substantiate the plea of adverse possession. 20 A. 182=18 A.W.N. 10.
- (c) Where, in a suit for possession of immoveable property, the defendant pleads adverse possession for more than twelve years, the burden lies on the plaintiff to let in *prima facie* evidence of possession within twelve years prior to suit, as the question of limitation becomes a question of title. 14 A. 193 (194); 11 A. 438 (447).
- (d) Where the plea of adverse possession is set up in a suit for possession of immoveable property, it must be ascertained when the defendant's possession became adverse to the plaintiff. 122 P.R. 1883.
- (e) Where the plaintiff has established his title to land, the burden of proving that the plaintiff has lost that title by reason of the adverse possession of the defendant is upon the defendant. 7 C.L.R. 364 (P.G.); 18 B. 513.
- (f) In the absence of other satisfactory proof of title or of long antecedent possession, a survey map is not sufficient for a person to recover land in the possession of another. 2 W.R. 210.
- (g) Where, in a suit for possession of ancestral property, the defendant pleads adverse possession, the *onus* lies on him to show such adverse possession. 62 P.L.R. 1902.
- (h) Where the defendant is admittedly in possession for more than 12 years before suit, the burden lies on the plaintiff to show that he had a title not barred by limitation and subsisting at the date of suit. 2 A.L.J. 62=A.W.N. (1905), 14. (Current Index, Adverse Possession).
- (i) Where the evidence of possession and enjoyment of certain hills by plaintiff was strong and undisputed, it was held that proof of adverse possession as against Government was unnecessary. 23 M. 69. (Current Index, 'Hills').

5.—'Adverse possession'.—(continued).

B.—Burden of proof.—(continued).

(3) Suit in ejectment :—

- (a) If the plaintiff in an ejectment suit is proved to have been in peaceable possession till within a short time before suit, when he was forcibly dispossessed by defendant, this is enough to call upon defendant to prove his title. 7 C. 591.
- (b) Where the plaintiff sought to disturb the admitted possession, for about 11 years, of defendants, who insisted on a longer possession as a statutory bar to the suit, the *onus* was on the plaintiff to prove the cause of action accrued to him on a dispossession within 12 years before suit. 1 W.R. 51 (P.C.) = 8 M.I.A. 199.
- (c) In a ——— it is not enough for the plaintiff merely to show that he had a title or that he was in possession at some remote time. He must show that he was in possession at some time within 12 years prior to suit. 5 C. 212.* But see and compare 15 C. 358.
- (d) In every suit for recovery of possession of land on the ground of dispossession, the plaintiff ought to start his case by proving his possession at some time within 12 years prior to suit. 9 C. 125.
- (e) Where a suit for ejectment is brought on the ground that the defendant is in wrongful possession, the burden lies on the plaintiff, of proving that he or his predecessor in title was in possession within 12 years before suit. 10 C. 374.
- (f) In a suit for ejectment, the burden of proof as to title lies on the plaintiff. In a suit for ejectment by a person claiming *Inam* and *miras* rights, the burden of proving *miras* rights lies on plaintiff. 4 Bom. L.R. 801.
- (g) Where the plaintiff was out of possession for more than 12 years before suit, he must make out some *prima facie* title, and some agreement or acknowledgment of that title depriving possession of its ordinary effect. 11 B. 216.
- (h) In a suit for ejectment, the defendant who sets up the plea of adverse possession, notwithstanding that he had once admitted the title of the plaintiff, must show, when the alleged adverse possession, under this article, commenced or under art. 189, when the tenancy terminated. 26 B. 442 = 4 Bom. L.R. 99.

(5) Waste lands :—

If, in a suit for possession of waste lands, the defendant sets up adverse possession, it is for the defence to prove adverse possession. It is enough for the plaintiff to prove a *prima facie* title. 105 P.B. 1901.

(4) Suit by vendee :—

In a suit by a vendee for possession, the vendor being out of possession at date of sale, the plaintiff ought to prove that his vendor was in possession at some time within 12 years prior to suit. 18 B. 338.

5.—'Adverse possession.'—(continued).

B.—Burden of proof.—(continued).

(5) Co-owners :—

Where two sisters jointly purchased property and one was in possession, the other being absent abroad and occasionally visiting the property on festive occasions, and the latter sued to recover possession, the burden of proving adverse possession was held to lie on the former, the suit being governed by this article. 14 M. 96.

(6) Suit for land reclaimed from a *bhil* :—

Where the ownership of land reclaimed from a *bhil* is contested between two parties and prior possession is proved by one of them having a title, the presumption is in favour of the continuance of such possession, when limitation is pleaded by the other party. In such a case, the party pleading adverse possession ought to prove it. It is enough if the plaintiff proves that the land was covered with water, down to a period within 12 years prior to suit, and that, before the land was covered with water, he (plaintiff) was in possession under a title. 19 C. 660 (P.C.) = 19 I.A. 140.

(7) —Lands submerged :—

If, in a suit for recovery of land covered with water more than 12 years before suit, the plaintiff proves acts of ownership, such as letting out *julkar* to tenants, &c., such acts are *prima facie* evidence of possession and ownership. In such a case, the defendant cannot succeed unless he proves more than 12 years' adverse possession. 9 C. 802.

(8) Joint Family property :—

In joint family property, the possession of one co-sharer is the possession of all, and it is for the co-sharer in possession to show that the other co-sharers have been excluded for more than the statutory period or have abandoned their rights. 118 P.R. 1889.

(9) Presumption of title :—

- (a) As to presumption of title out of possession and burden of proof, see observations of the Madras High Court in 15 M. 315 (at pp. 319, 320 & 321).
- (b) When a plaintiff proves his title and possession, the presumption is that his title continues till the defendant proves that the possession was interrupted; but where a plaintiff can prove title only and not possession, he must prove that the adverse possession of the defendant commenced within 12 years prior to suit; otherwise he cannot succeed. 9 M. 175.

(10) —Cultivated and unculturable lands :—

- (a) In suits for possession of lands under cultivation, plaintiff must first prove *prima facie* that his cause of action is not barred;
- (b) In the case of unculturable lands, the defendant must establish his adverse possession;
- (c) In the case of lands under cultivation at date of suit but previously uncultivated, the burden still lies on plaintiff. 5 C. 86.

5.—'Adverse possession.'—(continued).

B.—Burden of proof.—(concluded).

- (d) See, further, CANON under Heading 'Cases relating to Burden of proof' under art. 142, *supra*.

(11) —Mahomedan Law—Wakf:—

Where the enjoyment of the person in possession is not adverse to owner of the property, the owner's right will not be barred by limitation. 9 C.W. N. 625. [Current Index, Mahomedan Law (Wakf).]

C.—Acquisition of prescriptive title.

(a) —Will by karnavan:—

Where a karnavan of a Malabar *tarwad* made a will giving a life-interest to the devisee, cause of action for a suit by his successor in office would arise only on the death of the devisee. 14 M. 495.

(b) —Gift by karnavan:—

In the case of a gift by the karnavan of a Mappilla *tarwad*, adverse possession in favour of the donee commences from the date of the gift, and a suit for recovery of the property by a succeeding karnavan, brought more than 12 years from the gift, would be barred. 15 M. 19.

(c) —Non-payment of melwaram or landlord's share of rent:—

- (1) By the mere non-payment, by the tenant, of *melwaram* (i.e., landlord's share of rent or produce), unaccompanied by the assertion of an adverse title in himself, a tenant cannot acquire a prescriptive title to the *kudiraram* right. 18 M. 171.

- (2) By reason of the fact that an Inamdar could not sue to enforce acceptance of *pattaks* without obtaining registration of his title under the registered landlord and had not collected rent from the tenants for more than 12 years, the tenants cannot acquire rights against the Inamdar by adverse possession. 20 M. 6.

(d) —Effect of owner obtaining lease from trespasser:—

- Where the Government wrongfully took possession of certain land, and the true owner took *ajara* from Government and held it for over 12 years, the Government was held to have acquired a prescriptive title to the land at the end of the period of the lease. 29 C. 518 (P.G.)=29 I.A. 104=4 Bom. L.R. 537 and Mitra's Limitation, at p. 1061.

(e) —as against reversioners:—

See cases under art. 141.

(f) —Temple service lands—Acquisition of right:—

Where servants of a temple come into occupation of temple service lands as such servants, they cannot acquire, during the continuance of such possession, a right against the temple or its manager at their wish. 12 B. 322.

5.—'Adverse possession.'—(continued).

C.—Acquisition of prescriptive title.—(continued).

(g) —Tenancy:—

As to whether a tenant can, during the tenancy, acquire a prescriptive title by setting up an adverse title, see cases at pp. 1023, 1024 and 1025 under the Heading 'D—Adverse possession of tenant,' *supra*.

(h) —Want of registration, effect of:—

A purchaser under a deed invalid for want of registration may still acquire a title by adverse possession for more than 12 years. 4 B. 89.

(i) —Effect of entry of title in Survey Register:—

A Survey Officer acting under the Bombay *Kholi* Act has no authority to determine title. Hence limitation does not begin to run from the entry of the title in the Survey Register, but arises from the date of denial of plaintiff's title by defendant. 24 B. 533.

(j) Title by adverse possession how acquired by wrong-doer:—

A wrong-doer may acquire title by adverse possession for more than 12 years; such title may be transferred to a third party while in growth, so that, if the possession of the original wrong-doer *plus* that of the transferee should cover a period of more than 12 years, the original owner's title would be completely extinguished. 3 C. 224.

(k) Effect of abandonment by trespasser:—

If, before the acquisition of title by adverse possession, a trespasser in possession abandons the possession, the rightful owner on the abandonment is in the same position in all respects as he was before the trespass. 4 Bom. L.R. 537 = 29 C. 578 = 29 I.A. 104 (P.C.)

(l) Previous possession short of the statutory period:—

Mere—will not entitle a plaintiff to a decree for possession in a suit brought more than six months from the dispossession, even if the defendant cannot establish any title to the land sued for. 26 C. 579 = 3 C.W.N. 568 (*refg.* to 7 I.A. 73; *distg.*, 20 C. 934 = 20 I.A. 99, and *dissuading* from 8 W.R. 386 & 7 C. 591).

(m) —Suit on mortgage—Subsequent invalid sale:—

Suit for redemption—Defendant set up a subsequent sale, which was found to be invalid against plaintiffs:—*Held*, defendant did not acquire a title by adverse possession. 14 M. 38.

(n) —Suit by adopted son:—

A suit by the adopted son of the junior widow to recover possession of certain property from the defendant, who alleged himself to be the adopted son of the senior widow of the owner of the property, was *held* barred, as the possession of the defendant and his adoptive mother was found to be adverse for more than 12 years. 18 B. 100.

5.—'Adverse possession.'—(continued.)

C.—Acquisition of prescriptive title.—(concluded).

(a) —Mahomedan Law—Rights of son:—

As a Mahomedan son derives his right only from his father, a decree obtained against the father with reference to certain property is also binding on him and he cannot plead adverse possession for more than 12 years on the ground that he was not a party to the suit against the father. 21 B. 98.

(p) —Acquisition of permanent tenancy:—

A right of permanent tenancy may be acquired by adverse possession. In a case where the yearly tenancy of certain tenants having determined the latter set up a right of permanent tenancy to the knowledge of the landlord, such possession having continued unchallenged for more than 12 years, *held* the tenants had acquired a permanent right of occupancy subject to the payment of certain amount of rent. * 2f M. 585.

(q) —Limited interest:—

A prescriptive title to a limited interest (or partial interest) may be acquired in immoveable property by more than 12 years' adverse possession, because possession of a limited interest in immoveable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is adverse possession of a complete interest to bar a suit for the whole property. 18 M. 467.

D.—Relationship between Mortgagor and Mortgagee.

(a) Denial of mortgagor's title:—

Mere denial by the mortgagee in possession of the mortgagor's title to redeem is not enough to constitute adverse possession. 10 M. 189.

(b) Mortgagee can't set up adverse possession:—

Where a person enters into possession as mortgagee, he could not afterwards set up an adverse possession as owner so as to defeat the mortgagor's right to redeem. 14 B. 279.

(c) —Possession under mortgage:—

- (1) Possession of certain land obtained by a certain person under an agreement with the usufructuary mortgagee thereof, is not adverse as against the mortgagor, unless the latter had notice of the agreement and possession and unless such possession was in displacement of his rights in the land. 27 B. 43.
- (2) Adverse possession against mortgagee is not necessarily adverse to the mortgagor, because possession adverse to the mortgagor can only arise when the mortgagee becomes entitled to immediate possession. A.W.N. (1905), 4. (Current Index, Adverse Possession).

(d) —Permissive possession of mortgagor:—

The permissive possession of a mortgagor cannot be adverse to the mortgagee, and a suit to eject the mortgagor, brought more than 12 years after such possession, was not barred. 114 P.R. 1890.

5.—*Adverse possession.*—(continued).

D.—Relationship between Mortgagor and Mortgagee.—(continued.)

(e) —Purchaser at Court-sale:—

A purchaser at a sale, in execution of a mortgage-decree, effected without notice to the legal representatives of the deceased judgment-debtor, cannot set up, in a suit for redemption by those representatives, his sale, but can succeed if he could show adverse possession for more than 12 years. 21 B. 424.

(f) —Suit for redemption:—

In a suit for redemption of a mortgage denied by the defendant, there is no necessity to enquire when defendant's possession became adverse. It is for the plaintiff to prove that he has a subsisting title at the date of the suit. 71 P.R. 1900.

(g) —Possession of third party:—

(1) If, in a suit by a mortgagor for redemption, it is found that a third party had possession for more than 12 years adverse both to the mortgagor and the mortgagee, and such possession had not been derived from the mortgagee, his suit will be barred. 161 P.R. 1889.

(2) Where a mortgagee was obstructed from obtaining possession of the property mortgaged to him by a person having a lien thereon and the obstructor admitted the mortgagor's title to the property, the possession of the obstructor was not adverse as against the mortgagee. 10 B. 49.

(h) —Mortgagee placed in possession by Mamlatdar:—

Where a mortgagee, being placed in possession by the *Mamlatdar* because he paid assessment (but not under S. 214 of Act V of 1879), continued to pay the assessment, such possession of his cannot be said to be adverse in a suit for redemption by the mortgagor. 16 B. 184.

(i) —Mortgagee's suit after foreclosure:—

In a suit to recover possession by a mortgagee after foreclosure, the cause of action arises from the date of the expiry of the year of grace when the mortgagor's right to possession is determined. 90 P.R. 1895 (F.B.)

(j) Suit by one mortgagor against a redeeming co-mortgagor:—

(1) The possession of a co-mortgagor redeeming the mortgaged property will not be adverse to the other mortgagors. The latter's suit will not be barred even if brought more than 12 years after redemption by the former. 5 A.W.N. 51.

(2) If one of two mortgagors redeems the mortgage and enjoys the property, his possession will not be adverse to the other co-mortgagors unless such possession were proved to be in the assertion of an adverse title. 11 M. 416.

(3) Redemption of a mortgage by one of several mortgagor-co-sharers does not render his possession adverse as against the other co-sharers. Limitation will run only from the date when the possession becomes adverse by the assertion of an exclusive title in him and submission by the others to that right. 11 B. 422.

5.—'Adverse possession.'—(continued).

D.—Relationship between Mortgagor and Mortgagee.—(continued.)

- (4) Redemption of mortgaged property by a co-owner does not render his possession thereof after redemption adverse as against the other co-owners. 11 B. 425.
- (5) Where a Hindu or Mahomedan co-sharer redeems, from a mortgage, the family property, his possession would not become adverse as against the other co-sharers until some exclusive title is set up by him. 16 B. 191; 11 B. 422; 11 B. 425.
- (6) Where property was redeemed by a co-heir, in a suit by the other co-heir to recover his share in the property, limitation was not computed until the date when the plaintiff's share became due. U.B.R. (1892-96), 500.

(k) Mortgagor's putnidar :—

A mortgagor's *suit* for *khas* possession against the holder of a permanent tenure created by the mortgagor after the date of the mortgage, is not affected by the possession of the tenure-holder. 8 C. 79 = 9 C.L.R. 172, cited in Mitra's Limitation at p. 1058.

(l) Possession against mortgagor adverse to mortgagee :—

Where a mortgagor is dispossessed and his title to the property is disputed by another, limitation runs against the mortgagee from the date of the possession by that other on his adverse title to the mortgage. (1864) W.R. 375.

(m) Suit for redemption—Adverse possession against mortgagor and mortgagee :—

- (1) Where a defendant, in a suit for redemption, pleads that his possession of the property is adverse not only as against the mortgagee but also as against the mortgagor, the burden lies upon him of proving that his possession for 12 years prior to the suit was adverse to the plaintiff, the mortgagor. 18 B. 51.
- (2) Where the defendant has been in possession adversely to the mortgagor and the mortgagee, a suit by the mortgagee to enforce his lien on a simple mortgage against the mortgaged property, is governed by this article, the cause of action arising from the date the defendant's possession became adverse to the plaintiff. 5 A. 1 (P.C.) = 9 L.A. 99.
- (3) Where, in a mortgage by conditional sale, the foreclosure-proceedings are incomplete and irregular, the relation of mortgagor and mortgagee will still continue and a suit for redemption is governed not by this article but by art. 148. 1 P.L.R. 167.

(n) —against mortgagee not adverse against mortgagor :—

Where the grounds of dispossession of a mortgagee in possession do not imperil or call in question any right of the mortgagor so as to entitle him to insist on immediate possession, such dispossession cannot cause time to run against the mortgagor. 4 Bom. L.R. 721.

5.—'Adverse possession.'—(continued.)

D.—Relationship between Mortgagor and Mortgagee.—(concluded.)

(c) Mortgage by conditional sale—Commencement of time:—

In the case of a mortgage by conditional sale, limitation runs from the date of default and there is no new cause of action upon foreclosure. 14 B.L.R. 87=22 W.R. 90.

Other suits relating to mortgages:—

- (1) The possession of an usufructuary mortgagee holding over after the stipulated period is not adverse to the mortgagor who has a period of sixty years to sue for possession. 17 A.W.N. 214.
- (2) Where a decree directs payment in a certain time and in default foreclosure and the mortgagor commits default, the possession thereafter by the mortgagee will be not as mortgagee but as absolute owner and a suit must be brought by the mortgagor within 12 years from the date of default; otherwise the suit will be barred. 3 O.C. 38. [Current Index, Transfer of Property Act (IV of 1882).]
- (3) As between mortgagor and mortgagee, neither exclusive possession by the latter nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will give rise to adverse possession or support a defence of bar by limitation, if the parties are otherwise entitled to redeem. 9 C.W.N. 201 (P.C.)=2 A.L.J. 71=7 Bom. L.R.I. [Current Index, Mortgage (Redemption)].
- (4) Where, in a suit for redemption, it was found that the defendant's possession was adverse to the plaintiff for more than 12 years, the suit was barred; 60 years' rule did not apply. U.B.R. (1897-1901), 454; 464 & 469.
- (5) A suit by the purchaser of a mortgaged property for possession of the mortgaged property brought more than 12 years after the dispossession of the mortgagor by a stranger was barred. 4 C.P.L.R. 99.
- (6) Where, in a suit for redemption, the defence set up possession of the property for more than 12 years, after redemption of the mortgage thereon under a title inconsistent with that of the plaintiff, the suit was barred. U.B.R. (1892-96), 502.
- (7) Where, in a suit for redemption, the plaintiff failed to show that there was a subsisting relationship of mortgagor and mortgagee between him and the defendant and the latter was found to be in possession of the property for more than 12 years, the suit was barred. U.B.R. (1892-96), 509 and U.B.R. (1892-96), 516.
- (8) If, in a suit for redemption, the defendant's possession be found to be adverse to the plaintiff for more than 12 years, the suit would be barred. U. B.R. (1896-99), 513.
- (9) A suit on a mortgage by the previous owner against persons who had been holding adversely to the previous owner for more than the statutory period prior to the date of the bond, is barred and unsustainable. 18 M. 342.

5.—'Adverse possession.'—(continued).

E.—Suits between landlord and tenant.

(a) —Tenant holding over:—

- (1) Possession of a tenant holding over after the expiration of his lease without further agreement is wrongful and would constitute adverse possession. 22 B. 893.
- (2) The possession of a tenant holding over is wrongful; and, if there is no evidence from which a fresh tenancy can be inferred in the strict sense of the term, time begins to run against the landlord from the expiry of the fixed lease. 24 B. 504=2 Bom. L.R. 491.

(b) —Possession of heirs of tenant.

Where a tenant's heirs continue in possession after the expiry of the tenancy, their possession is permissive and not adverse, until they set up a title of ownership in the property. 11 B. 256.

(c) —Acquisition of limited interest:—

- (1) Where a tenant not only openly asserts to the knowledge of the owner an adverse interest, but proceeds to enjoy benefits claimable only on the basis of that interest, his possession at once becomes adverse, and limitation begins to run from that time. The fact that such assertion and enjoyment are not challenged, does not change their adverse character, whenever the necessity of challenging it has arisen. 27 B. 515=5 Bom. L.R. 274.
- (2) A partial, as well as a whole, interest in land may be lost or acquired by adverse possession. A landlord, allowing his tenant to assert the validity of an invalid lease or a particular tenancy for more than 12 years, will be debarred from questioning its validity afterwards. 21 B. 509.

(d) —Acquisition of permanent tenancy:—

- (1) There can be adverse possession of a limited interest in property as well as of the full title as owner. Where a tenant enters into possession under conditions which would give him a permanent tenancy and continues in possession as a permanent tenant for more than 12 years, he becomes a permanent tenant by adverse possession. 27 B. 515=5 Bom. L.R. 274.
- (2) The holding of a tenant for more than 12 years adversely to the landlord in the assertion of a title to a permanent tenancy, will not prevent the landlord from enhancing the rate of rent, unless it be proved that the possession of the tenant was similarly adverse to the right of the landlord to enhance the rent within the limits allowed by usage. 5 Bom. L.R. 186.

(e) Acquisition of title to other claims:—

A landlord merely by receiving rent cannot preserve his right to other claims continuously denied by the tenant. 27 B. 515=5 Bom. L.R. 274.

(f) Non-participation of rents and profits:—

- (1) As between a landlord and a tenant, the mere non-participation of rents and profits of the land on the part of the former would not constitute

5.—'Adverse possession.'—(continued).

E.—Suits between landlord and tenant.—(continued.)

adverse possession on the part of the latter. To constitute adverse possession and a bar by limitation, there must have been a determination of the tenancy more than 12 years before suit, and where the suit for possession is brought by the landlord, the tenant must show such determination of the tenancy. 21 M. 153 (160) = 8 M.L.J. 92.

(2) Mere non-payment of rent is not sufficient to constitute adverse possession. 7 B. 40; 2 A. 517 (F.B.); 4 C. 661.

(3) Non-payment of rent by a tenant for more than 12 years, or holding over after expiry of the term, does not make the possession of the tenant adverse, unless there was repudiation of the contract by which he entered into possession or assertion of a right inconsistent with that of his landlord. 7 B. 34. Cf. 18 M. 171.

(4) To see whether a suit to recover possession of land in the possession of tenants is in time, it must be ascertained whether the tenants had paid the rent to the plaintiff to a period within 12 years before the institution of the suit or not. 1 C.W.N. 246.

(g) —What amounts to disclaimer:—

A manifest assertion by the tenant to the knowledge of the person representing the landlord's interests of a right inconsistent with that claimed by the landlord to treat him as a tenant-at-will or from year to year, would be a disclaimer of the landlord's title. 27 B. 515 = 5 Bom. L.R. 274.

(h) —Suit in ejectment:—

An Inamdar's suit against a permanent tenant for enhancement of rent or for ejectment in default, brought more than 12 years after notice for enhancement of rent and denial by tenant of the landlord's title, held barred. 21 B. 394.

(i) —Assertion of adverse title:—

8. M.L.J. 92 = 21 M. 153 ——— No. 4, p. 1051, *supra*.

(j) —Proprietor and farmer:—

(1) *Per PLOWDEN, J.*—Where the proprietor has notice of the claim of proprietary title by the farmer, the latter's possession may become adverse to the former under some circumstances. 41 P.R. 1881.

(2) The omission to assert proprietary title coupled with other circumstances, may constitute such a discontinuance of possession as would bar a suit for the recovery of proprietary possession brought by the owner at the expiration of the term. 41 P.R. 1881.

(k) —Forfeiture—Landlord's suit:—

If lands are sought to be recovered on the ground of forfeiture incurred by the tenant on account of alienations made by him, the landlord's suit would, on the particular cause of action alleged, be barred unless the suit is brought within 12 years from the forfeiture. 15 M. 123.

5.—'Adverse possession.'—(continued).

E.—Suits between landlord and tenant.—(concluded.)

(i) **Possession adverse to lessee adverse to lessor :—**

Possession adverse to lessee is also adverse to lessor. 9 C.L.R. 347.

(iii) **Adverse possession—Tenant for life :—**

See 27 C. 156 (P.C.) = 26 I.A. 216 = 4 C.W.N. 274 (No. 11) at p. 1024, *supra*.

(n) **Effect of trespass against lessee :—**

Where land, while it is in the possession of a lessee, is trespassed upon by a trespasser, adverse possession against the landlord commences only on the expiry of the lease, and not from the date of the trespass. The landlord may sue the trespasser in ejectment, within 12 years from the expiry of the lease. 10 C. 577.

(o) **Adverse possession—Encroachment by tenants :—**

Encroachment by a tenant on the adjoining waste lands of the landlord will not commence to be adverse unless and until the tenants assert an adverse title or until the landlord becomes aware of the encroachment. 31 C. 970.

F.—Evidence and Pleadings.

(1) **Nature of evidence to be let in :—**

(a) In order to be a complete answer to a suit, the possession must be continuous. Temporary interruption caused by wrongful possession given by a Court to a third person, does not affect the continuous character of the adverse possession. 22 B. 733.

(b) Adverse possession must be shown to be continuous, public and adequate to the circumstances of the case. 25 B. 362 = 3 Bom. L.R. 47.

(2) **Adverse possession—Pleadings how to be prepared :—**

If plaintiff rely on title as well as adverse possession, he must set out the latter plea with sufficient clearness, so as to enable his adversary to understand that he (plaintiff) sought to succeed on title as well as on adverse possession. 7 C. 546.

(3) **Suit based on title—Proof of dispossession alone not sufficient :—**

In a suit for possession of land based on title, mere proof of possession and dispossession within 12 years before suit would not be sufficient to entitle the plaintiff to a decree. 9 C. 130 = 11 C.L.R. 893.

(4) **Suit on title—Success on adverse possession :—**

Where, in a suit for possession based upon title, the plaintiff was not able to prove title, but proved adverse possession for more than 12 years, he would be entitled to get a decree in his favour, notwithstanding the fact that he did not set up adverse possession in the plaint. 14 C. 592.

(5) **Claim based on title and adverse possession :—**

(a) If a person bases his claim on title and adverse possession, he will be entitled to succeed on the latter plea alone if he proves more than 12 years' adverse possession even if he should fail to prove title. 3 C. 244 ; 4 C. 699 = 3 C. L.R. 450.

5.—'Adverse possession.'—(continued).

F.—Evidence and Pleadings.—(concluded)..

- (b) Where, in a suit for possession, the defendant was found to be in possession of the property for a long time, the burden lay, on the plaintiff, of establishing by clear and trustworthy evidence that he had some sort of possession in respect of the property or enjoyment of benefit from, or interest in, it within 12 years before suit. U.B.R. (1892-96), 498.
- (c) In a suit for possession, the plaintiff must show possession within 12 years before suit. U.B.R. (1892-96), 518.
- (d) Where, in a suit for possession, the plaintiff did not show possession or enjoyment of an interest in the property within 12 years before suit and the defendant's possession was adverse as against plaintiff for more than 12 years, the suit was dismissed. U.B.R. (1892-96), 487.
- (e) Where, in a suit for possession, the plaintiff did not allege that plaintiff had possession or enjoyment of the property within 12 years before suit and it was found that it was for a long time in one branch of the plaintiff's family, the plaintiff should have been rejected as showing no cause of action. U.B.R. (1892-96), 507.
- (f) Where land comes into possession of one branch of a family on their own account and not on that of the whole family, adverse possession begins to run against the other members of the family from the date of such possession. U.B.R. (1892-96), 444.
- (g) Where, in execution of a money decree, the share of the judgment-debtor in certain property was attached, no bar of limitation could be raised to prevent the co-heir from discharging the amount of the decree and obtaining the release of the share of the property from attachment. U.B.R. (1892-96), 459.
- (h) A suit by a grand-daughter to recover her grand-father's property from his widow instituted more than 12 years after his death was barred. L.B.R. (1898-1900), 580.
- (i) Where, in a suit for possession, the plaintiff does not base his claim upon the fact of himself or his predecessor in title ever having been in possession, but rests his claim upon title only, he would be entitled to succeed unless the defendant shows that he holds the land adversely for 12 years. L.B.R. (1903), 56.

G.—Miscellaneous Cases.

Abandonment of land:—

Where a mirasdar allowed his land to lie waste and it was taken up by the defendant, the cause of action for a suit by the mirasdar to recover the land accrued when the land was taken up by the defendant. 6 Bom. H.C.A.C. 66.

Suit for dispossession of an assign:—

8 P.R. 1899—No. 8, p. 1053, *supra*.

Possession of Government not adverse:—

Possession taken by Government for the enforcement of revenue demand, is not adverse to the true owner. 2 A. 1 (P.C.) = 9 I.A. 90.

5.—'Adverse possession.—(continued).

G.—Miscellaneous Cases.—(continued).

Possession of tenant possession of landlord :—

Possession of the tenant, notwithstanding an adverse claim by him, is that of the landlord. 4 Bom. L.R. 587=29 C. 578=29 I.A. 104 (P.C.).

Possession given by Court :—

Possession given by Civil Court under a mistake would still be legally adverse possession.—*Per GLOVER, J.* 11 W.R. 49.

Attachment of *vatan* lands :—

Where certain *vatan* lands were attached during the Peishwa's Government, and the British Government which continued the attachment for some time first resumed and then restored them to the plaintiffs, the period of limitation in favour of those in possession as tenants under British Government, would commence from the date of restoration to the plaintiffs, and not from the date of resumption. 8 B. 585.

Presumption of title—Payment of rent by Government :—

The admission by the Government that they had paid rent to the plaintiff is sufficient in law to raise a *prima facie* presumption of title in plaintiff's favour, and the *onus* lies upon the Government of proving that the land belongs to Government and that the rent was paid by them under mistake. 26 B. 410=4 Bom. L.R. 28.

Adverse possession against *putnidars* &c. :—

Where land is leased in *putni* and *durputni*, and the *putnidars* and *durputnidars* are dispossessed by strangers who remain in adverse possession for more than 12 years, the landlord-lessor's suit against the trespassers will be barred though brought within 12 years from the voluntary relinquishment of the *putnidars* and *durputnidars* in his favour. 26 C. 460 (*distg.*, 25 C. 167; 23 C. 863; 13 C. 101; 18 B. 301).

—Co-parcenary property in the hands of strangers :—

The possession of the purchaser of the interest of one member of a Hindu co-parcenary will be adverse to the other members of the co-parcenary, the rule that one co-parcener's possession is the possession of all not applying to such a case. 12 M. 292.

Suit in ejectment—Proof of *mokurraee* tenure :—

Where, in a suit for ejectment, the defendant proved that he held the land for more than twelve years previous to the institution of the suit under a *mokurraee* tenure to the knowledge of the plaintiffs, the suit was barred by limitation. 13 W. R. 129=12 B.L.R. 282 (Note).

Suit between purchaser of *Zemindari* and *mokurraee* holders :—

Where a *Zemindari* was sold for arrears of revenue and, after much litigation, certain lands in the *Zemindari* were restored to the possession of certain *mokurraee*-holders, in a suit by the purchaser of the *Zemindari* to recover possession of the lands, limitation was computed from the

5.—'Adverse possession.'—(continued).**G.—Miscellaneous Cases.**—(continued).

date of the delivery of possession to the *mokurraes*-holders and not from the date of the plaintiff's purchase of the Zemindari. 3 W.R. 5 (P.C.) = 10 M.I.A. 105.

Ancestral property—Case of entrustment :—

A suit to recover the plaintiff's share in the property left by the common ancestor of himself and defendant, on the allegation that after having obtained possession of his share, it was entrusted to the defendant, who refused to deliver the same, was governed by this article. 97 P.R. 1890.

Lands alleged to be granted for maintenance :—

Where, in a suit for the recovery of land, the defendant set up adverse possession and the plaintiff does not show as alleged by him that the land had been given for maintenance of the person under whom defendant derived his title, defendant's adverse possession must prevail. 26 B. 617 = 4 Bom. L.R. 312.

Possession under an alleged sale :—

Possession taken by a vendee from a deceased person is adverse to the heirs of the deceased from the moment of sale; the heirs-at-law ought to sue within 12 years from the date of sale. This article and not art. 142 would apply to such a suit. 2 C.L.R. 10.

Adverse possession of equity of redemption :—

There can be adverse possession of the equity of redemption. Where the equity of redemption is held adversely for more than 12 years, a suit for redemption of the mortgage by the mortgagor or his heirs will be barred. 14 B. 176.

Service Inams—Lands attached to hereditary offices :—

Lands granted as remuneration for service become adverse when service is no longer required. And land granted for an hereditary office becomes adverse when the need of service ceases altogether. 22 B. 422.

Zemindar's suit for declaration—Accretion :—

So long as the proprietary right of a Zemindar is formally recognized by the Revenue authorities, the period of limitation for a suit, by the Zemindar for a declaration of his right to a share in the settlement of an accretion, does not begin to run. 17 W.R. 145.

Zemindar's suit for possession—Mokurraes grant set up :—

In a suit by a Zemindar to recover possession of certain lands in the Zemindari and set aside an alleged *mokurraes* grant in respect of it, limitation was computed from the date when the Zemindar had notice of the defendant's claim under the *mokurraes* grant. 19 W.R. 252 (P.C.).

Extinction of title :—

Adverse possession by the defendant for more than 12 years would extinguish the plaintiff's right to the property, notwithstanding any provision of the Burmese Law of Inheritance to the contrary. L.B.R. (1872-92), 51.

(Old Acts).

[Act IX of 1871, Art. 149:—First and third Cols., same as above: second Col., 'thirty years.']

[Act XIV of 1859, S. 6.—*In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt.*]

(Notes).

Scope of article.

- (a) Ss. 20 and 21 of the Limitation Act are inapplicable to suits for possession under this article. 26 A. 167; 18 A. 295.
- (b) Where the mortgagor is permitted to remain in possession of the mortgaged property as long as he pays interest, a fresh right to sue accrues to the mortgagee, under art. 135, when that permission ceases and the mortgagor's right to possession is determined. 16 W.R. 33 (P.C.)
- (c) Where the mortgage-deed gives a right of entry to the mortgagee in case of default, but no steps were taken to obtain possession after default; *held* that a suit by the assignee of the mortgagee to recover possession of the mortgaged property from the mortgagor's vendee, brought more than 12 years after the purchaser had obtained possession, was barred under s. 1, cl. 12 of Act XIV of 1859. 8 B.L.R. 104=14 M.I.A. 144.
- (d) A mortgagee, who was wrongfully dispossessed of the mortgaged property, can successfully maintain a suit, if brought within time, to recover possession of the same, though his claim for foreclosure may be barred by limitation. 27 C. 165=7 C.W.N. 20.
- (e) This article relates to a special kind of mortgage known as English mortgage and includes only that class of suits in which the remedy is either foreclosure or sale in the alternative. 14 C. 790 (F.B.)

1.—'From the mortgagor.'

- (a) The suit contemplated by art. 135 is a suit against the mortgagor himself or anybody else. 12 C. 614.

But this article expressly refers to suits by the mortgagee against the mortgagor only.

- (b) Where, on the application of the mortgagee, a Receiver is appointed by Court, he is treated as the legal agent of the mortgagor. 26 B. 221 (227) (F.B.)

2.—'On account of the mortgage-debt.'

Money paid by surety:—

- (a) Money paid by a surety cannot be a payment "on account of the mortgage-debt" within the meaning of this article. 28 B. 248 (251).
- (b) This article only applies to cases in which some part of the principal or interest of the mortgage-debt has been paid. 4 C. 283=3 C.L.R. 386.

146 A.—By or on behalf of any *Thirty years.* The date of dispossession or discontinuance.
 local authority for
 possession of a ny
 public street or road,
 or any part thereof
 from which it has
 been dispossessed, or
 of which it has dis-
 continued the posses-
 sion (1).

Scope of article.

- (a) This article cannot be restricted to streets or roads formed by the Municipality on lands belonging to, or acquired by, it in proprietary right. 25 M. 635 = 12 M.L.J. 37.
- (b) The doctrine "once a highway, always a highway" was not applicable to India even before the enactment of this article and adverse possession of a highway for 12 years before the passing of this article would have extinguished the highway. 25 M. 635 = 12 M.L.J. 37.
- (c) Adverse possession of a land dedicated as highway will give the ownership of the land in 12 or 60 years according as the owner is a private person or the Government and the burden of highway will be extinguished in 30 years according to this article. 25 M. 635 = 12 M.L.J. 37.

147.—By a mortgagee for *Sixty years.* When the money secured by the mortgage becomes due.
 foreclosure or sale.

(Old Acts.)

No corresponding provision in either of the old Acts.

Scope of article.

(General).

(1) Applicability of article :—

- (a) This article applies only to the enforcement of charges upon immoveable property, by foreclosure or sale, when created by a transaction which is a mortgage. 151 P.R. 1888.
- (b) This article applies to all suits properly brought by a mortgagee for foreclosure or sale. 10 B. 519.
- (c) A mortgagee, who could not sue for possession under art. 135, would still sue for foreclosure under this article. 88 P.R. 1888.

(2) Mortgage and charge, difference between :—

See No. 4, at p. 983, *supra*.

(3) Suit on bond, whether a mortgage nor a charge.

- (a) See 14 C. 687, No. 2, at p. 983, *supra*, under the heading "Calcutta Cases."

Scope of article. —(Continued.)

General.—(Continued.)

- (b) Where a bond provides that, if the money advanced is not paid on the due date, the obligee will be entitled to recover the amount from any moveable and immovable property of the debtor, *held*, that no charge or mortgage is created thereby and that a suit to recover the debt on such a bond is not governed by art. 132 or this article, but by art. 60. 14 A. 162.
- (4) **Right to redeem and right to foreclose:—**
- (a) In the absence of any stipulation, express or implied, the right to redeem and the right to foreclose are co-extensive. 5 B. 22.
- (b) There is no such rigid principle that redemption and foreclosure are co-extensive. 10 A. 602 (608) [following 2 M. 314].
- (c) The rule, that the right to redeem is co-extensive with the right to foreclosure, is not applicable to cases falling under the *Bankers' and Agriculturists' Relief Act*, and an agriculturist-mortgagor may bring a suit for redemption before the time fixed for payment of the mortgage-debt on the ground that the debt has been satisfied. 6 B. 734.
- (5) **Remedy of mortgagee against stranger:—**
- (a) Where the mortgaged property is held adversely to the mortgagor and the mortgagee, a suit by the mortgagee is governed by art. 144. 18 B. 51.
- (b) A mortgagee is bound to vindicate his title to land against a third party in adverse possession within 12 years, though he is entitled to bring a suit for foreclosure or sale within 60 years from the date the mortgage-amount becomes payable. 25 A. 35 (38).
- (c) Where a mortgagor was dispossessed by a third person claiming adversely to him, in the absence of litigation between him and such third person, the cause of action accrues to the mortgagee as against the new comer from the date of dispossession. (1864) W.B. 375.
- (d) Receipt of rent, for more than 12 years, from the mortgagee in possession, by a stranger claiming adversely to the mortgagor, extinguished the equity of redemption in the mortgagor. 6 C.W.N. 601.
- (6) **Remedy of person having two mortgages:—**
- See No. 8, at p. 985, *supra*.
- (7) **Co-mortgagor paying mortgage-amount:—**
- (a) A —and redeeming the property, has a charge on the property redeemed as against the other mortgagors bound to recoup him (the redeeming co-mortgagor). A suit by the other co-mortgagors, to redeem their shares on payment of their quota of the amount paid towards redemption, is not governed by this article. 26 B. 500 = 4 Bom. L.R. 178.
- (b) A co-mortgagor, redeeming the mortgaged property with funds out of his pocket, has only a charge on the property redeemed in respect of the amount so paid. A suit by him to recover the amount by charging the property is governed by art. 132 and not by this article, because he is not a 'mortgagee' within the meaning of this article. 1 A.L.J. 276; 12 A. 110; A.W.N. (1904), 3.

Scope of article.—(Concluded.)**General.—(Concluded.)****(8) Suit to enforce mortgage lien :—**

See Nos. 1 and 3, 12 C. 111 and 14 C. 790 (F.B.), at p. 983, *supra*, under the heading 'Calcutta Cases.'

(9) Suit for foreclosure or sale :—

See 12 C.P.L.R. 26, at p. 987, *supra*.

(10) Right barred before the present Act :—

Where, under the provisions of Act XIV of 1859 or Act IX of 1871, which allowed only a 12 years' limitation on suits for foreclosure or mortgage, the right to sue had expired before Act XV of 1877 came into operation, the 60 years' rule provided by this article would not apply to a suit for foreclosure of mortgage. 14 B.L.R. 87; 26 A. 4 (8).

(11) Sale or foreclosure, when mortgagor's interest sold :—

Where, notwithstanding that the interest of the mortgagor was sold in execution of a decree against him, he continued in possession of the property, till his death, along with the purchaser, a suit by the mortgagee for sale or foreclosure would be in time if brought within 12 years from the date of the death of the mortgagor, though more than 12 years from the date of the sale. 7 C. 394.

(12) Extension of period :—

In the case of payments made by mortgagor or the appropriation of profits for interest by a mortgagee in possession, s. 20 of the Limitation Act would extend the period of limitation in favour of the mortgagee alone. 26 A. 167 (170).

2.—Suits for Sale.***(1) Suit by mortgagees for sale :—**

(a) See No. 2 (a, b and c), at p. 982, *supra*.

(b) See 2 C.P.L.R. 57, at p. 987, *supra*.

(c) See 1 P.L.R., p. 178, at p. 986, *supra*.

(2) Suit to enforce mortgage-lien by sale :—

(a) See 14 B. 577, No. 3, at p. 983, *supra*, under the heading 'Bombay Cases.'

(b) See No. 6 (a and b), at p. 985, *supra*.

3.—Suits for money based on mortgages.

(a) See 19 P.R. 1885, at p. 986, *supra*.

(b) See 1 P.L.R., p. 43, at p. 986, *supra*.

(c) See 18 B. 90 (F.B.), No. 2, at p. 983, *supra*, under the heading 'Bombay Cases.'

4.—Usufructuary mortgages.**(a) Remedy of usufructuary mortgage :—**

See No. 3, at p. 984, *supra*, under the heading 'Madras Cases.'

(b) Usufructuary mortgage containing personal covenant :—

See No. 4, under the heading 'Madras Cases,' at p. 984, *supra* and top of p. 985, *supra*.

4.—Usufructuary mortgages.—(Concluded.)

(c) Foreclosure or sale:—

A suit by an usufructuary mortgagee, out of possession, for foreclosure or sale of the mortgaged property is governed by this article. 16 M. 64.

(d) Suit by usufructuary mortgagee for money—Failure to secure possession.

(1) See No. 5 (a and b), at p. 985, *supra* and 23 P.R. 1900, at p. 986, *supra*.

(2) See No. 3, at p. 982, *supra*.

(e) Destruction of mortgaged property—Suit for money:—

See U.B.R. (1897-1901), 518, at p. 987, *supra*.

(f) Mortgage-deed containing covenant to pay:—

See No. 9, at p. 985, *supra*.

(g) Mortgagee's right to possession on default of payment:—

Where a mortgage-deed stipulated that, upon default by the mortgagor in payment of the mortgage-money, the mortgagee should take possession of the property as absolute owner thereof, the mortgagee could sue to recover possession within 12 years from the time at which his right to possession commenced. 10 C. 68.

5.—Mortgages by conditional sale.

(1) Suits by mortgagee by conditional sale.

(a) See No. 2, under the heading 'Madras Cases,' at p. 984, *supra*.

(b) This article has no application to a suit on a mortgage by conditional sale. 20 C. 269.

(c) This article would not apply to any mortgage by conditional sale executed between Hindus and in respect of properties situated in the mofussil. 12 C. 614 (620).

(d) Where, in consequence of the proceedings instituted under Regulation XVII of 1806, the mortgagor's right to possession in respect of a mortgage by conditional sale was brought to an end without a suit for foreclosure, a suit for possession, instituted by the mortgagee more than 12 years after the mortgagor's right to possession determined, was barred by art. 135, this article not being applicable to such a suit. 16 C. 698.

(e) Where proceedings, under S. 8, Regulation XVII of 1806, had come to a close in respect of a mortgage by conditional sale by the expiration of the stipulated period of extension, while the Regulation was in force, the mortgagee, after the passing of the Transfer of Property Act, was entitled to a decree such as would have been passed while the Regulation was in force. 14 C. 451.

(f) A mortgagee by conditional sale, who was put into possession of the mortgaged property but was subsequently dispossessed, could sue to recover possession of the property, although his claim for foreclosure might be barred by limitation. 27 C. 185.

(g) Where, after the passing of the Transfer of Property Act, a suit for foreclosure of a mortgage by conditional sale executed before the Act was instituted, the procedure prescribed by the Act applied to the suit. 12 C. 583.

5.—Mortgages by conditional sale.—(Concluded.)

- (h) A suit, brought after the Transfer of Property Act came into force, for foreclosure, under a mortgage-deed of conditional sale executed when the old Regulations were in operation, was governed by this article and not by art. 135. 8 C.P.L.R. 65 and 83.
- (i) A suit for foreclosure, upon a mortgage by conditional sale, must be brought within 12 years from the date specified for payment of the mortgage amount, the cause of action being the original non-payment of money on the due date. 11 A. 144=9 A.W.N. 41.

(2) Suit for possession :—

A suit by a mortgagee for possession of the property mortgaged to him by way of conditional sale instituted more than 12 years after the date fixed for re-payment of the mortgage-money was barred, either under art. 135 or art. 144. 35 P.R. 1899.

6. Equitable mortgages.**Equitable mortgages by deposit of title-deeds :**

- (a) See L.B.R. (1872-1892), 555, No. 2, under the heading 'Equitable mortgages by deposit of title-deeds,' at p. 989, *supra*.
- (b) See, also, under the same heading, cases Nos. 3 and 4, at p. 989, *supra*.
- (c) In the case of an equitable mortgage by deposit of title-deeds, a suit for foreclosure is governed by this article. 22 B. 164 (169).
- (d) In a suit upon mortgage by deposit of title-deeds in respect of immoveable properties situated outside the limits of Calcutta, the appropriate remedy was a decree for sale, since the transaction took place in Calcutta. 24 C. 348.

7.—Suits on Hypothecation bonds or Simple mortgages.**1) Suits on hypothecation-bonds :—**

- (a) See No. 1, under the heading 'Madras Cases,' at p. 934, *supra*.
- (b) See No. 10, at p. 985, *supra*.
- (c) See 33 P.R. 1897, at p. 986, *supra*.
- (d) See 15 B. 183, No. 4, at p. 983, *supra*, under the heading 'Bombay Cases.'
- (e) A suit upon a hypothecation-bond, payable on demand, executed before the Transfer of Property Act came into force, was governed by art. 132 and not by this article. 7 M.L.J. 315.

(2) Instalment hypothecation-bond, suit on :—

See No. 6, at top of p. 934, *supra*.

(3) Suit for sale on simple mortgage :—

- (a) See 112 P.R. 1890 (F.B.) (following 14 C. 730 and overruling 151 P.R. 1888), at p. 986, *supra*.
- (b) A hypothecation-bond containing a power of sale in case of default is a mortgage-bond and a suit for sale on default is governed by this article. 14 B. 377.

7.—Suits on Hypothecation bonds or Simple mortgages.—(Concluded.)

(c) Where a mortgage-bond gives a power of sale, express or implied, in the event of non-payment of the mortgage-debt on the due date, a suit to recover the debt by sale of the mortgaged property is governed by this article. 10 B. 592.

(d) See 3 O.C. 156, under the heading 'Oudh Cases,' at p. 987, *supra*.

(4) Security pledges :—

See No. 5, 20 B. 408, under the heading 'Bombay Cases,' at p. 983, *supra*.

(5) Suit for personal remedy :—

Though a suit to recover mortgage-debt from mortgaged property is governed by this article, the period of limitation for a suit to recover the debt from the mortgagor personally is three years. 14 B. 377.

(Old Law).

(1) In the case of a mortgage by conditional sale, limitation began to run against the mortgagee from the date of default; Regulation XVII of 1806 did not debar him from the stipulated possession. 22 W.R. 90.

(2) Under Act XIV of 1859, a mortgagee was bound to sue within 12 years from the date of default, except where the mortgagor or the person in possession held by permission of the mortgagee after the date of default. 12 C. 614.

(3) Where, while Act XIV of 1859 was in force, a remedy in respect of a mortgage had become barred by lapse of time, the extended period of limitation given by Act IX of 1871 did not revive the right under the mortgage. 4 C. 283.

(4) Under Act XIV of 1859, a suit for foreclosure or sale was held to be a suit for the recovery of immoveable property or of an interest in immoveable property and was governed by the 12 years' limitation under S. 1, cl. 12. 3 B. 312 (331); 10 B. 519 (524).

(5) Under Act IX of 1871, a suit for foreclosure was governed either by the 12 years' limitation prescribed under art. 132 or by the 60 years' limitation under art. 149. 3 B. 312 (331).

148.—Against a mortgagee (1) *Sixty years.* When the right to redeem (2) or to recover possession of immoveable property mortgaged.

to redeem (3) or to recover possession accrues (4):
Provided (4) that all claims to redeem, arising under instruments of mortgage of immoveable property situate in British Burma, which have been executed before the first day of May 1863, shall

be governed by the rules of limitation in force in that province immediately before the same day.

(Old Acts).

[Art. 148 of Act IX of 1871 :—Against a mortgagee to recover possession of immovable property mortgaged—Sixty years—The date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing signed by the mortgagee or some person claiming under him, and, in such case, the date of the acknowledgment.

Proviso.—Same as the proviso in the present Act.

Act XIV of 1859, S. 1, cl. 15.—See same clause printed under art. 145, *supra*.

(Notes).

Scope of article.

(1) Applicability of article :—

This article applies to suits for redemption brought against mortgagees and their assigns except purchasers for value; but not to suits against strangers nor to suits, which are not suits for redemption. 2 M. 226.

(2) Mortgage Subsequent agreement :—

Where, after the expiry of the period fixed for redemption of a mortgage, the parties agreed that the mortgagee should enjoy the mortgaged property absolutely for a certain number of years and then surrender, the transaction lost its original character of mortgage and a suit for redemption held governed not by the 60 years' limitation but by the 12 years' rule. 6 B. 674.

(3) Mortgage --Wajib-al-arz :—

Where the wording in a *wajib-al-arz* amounts to a mortgage by conditional sale, a suit by a defaulting co-sharer to recover his *patti* against another co-sharer, who has paid the Government revenue, is governed by this article. 1 A.L.J. 48=26 A. 337.

(4) Land assigned by award conditioned upon payment of money :—

Where an arbitrator's award assigns land to plaintiff conditioned on payment of money, a suit for recovery of the same on payment of the money, is governed by this article. U.B.R. (1897-1901), 446.

(5) Mortgage resulting from decree of Court :—

Where a decree of Court constitutes a mortgage, it would, for purposes of redemption, be governed by the rule of limitation contained in this article. 10 P.R. 1888.

Scope of article.—(Concluded.)

(6) Redemption by a person not interested :—

Where a party not really interested in the equity of redemption redeems a mortgage and is in possession, a suit against him by the representative of the mortgagor would be governed by the 60 years' limitation, because he is in the same position as the assignee of the mortgagee and as such cannot rely on art. 184 of the Act. 124 P.R. 1883.

(7) Suit for pre-emption arising out of foreclosure :—

A suit for pre-emption arising out of the foreclosure of a mortgage by conditional sale of a share in an undivided Zemindari village was governed by art. 120. 20 A. 875.

(8) Suit by purchaser of equity of redemption :—

In a suit for redemption of a usufructuary mortgage by the purchaser of the equity of redemption, held that the purchase being admitted, this article and not art. 137, or art. 144 was applicable. 9 A.W.N. 135.

(9) Mortgage by conditional sale how enforced :—

A contract of mortgage by conditional sale ought to be enforced according to its letter, the essential characteristic of such a mortgage being that, on default of payment, the contract executes itself and the transaction is closed without any further act of the parties or accountability between them. 1 M. 1 = 2 L.A. 241 (P.C.) ; 13 M.L.A. 560 ; 3 M. 26 ; 8 M. 185.

(10) Suit for redemption against mortgagee's assign :—

A—against the purchaser of a mortgagee's interest with the knowledge that he was purchasing such interest is governed by this article and not by art. 184. 6 A.W.N. 203 = 9 A. 97 ; 1 A.W.N. 169 ; 122 and 75.

(11) Redemption of right to officiate as priest :—

A suit for— was not governed by art. 145 of the Act but by this article. 10 C. 73 = 13 C.L.R. 263.

(12) Agreement amounting to mortgage :—

Where an agreement amounted to a mortgage and it did not specify a definite period over which the mortgage was to extend and did not prohibit redemption within any specified date, the suit for redemption would be governed by the 60 years' limitation provided by this article. 57 P.R. 1883.

1.—'Against a mortgagee.'

(1) Redemption suit against redeeming co-mortgagor :—

(a) A—for the plaintiff's own share out of the property redeemed by the co-mortgagor is not governed by this article, which is applicable only to a suit against a mortgagee. A redeeming co-mortgagor is not a mortgagee. He has only a lien for the money, paid by him towards redemption, against his co-mortgagors. 26 B. 500 ; 4 Bom. L.R. 78. Cf. 11 B. 422 ; 16 B. 191.

(b) The suit against the redeeming co-mortgagor can be brought at any time until the redeemer's title becomes indefeasible by 12 years' adverse possession. 3 Bom. L.R. 685 (dissenting from 11 A. 423).

1. - 'Against a mortgagee.'—(Continued.)

- (c) A—~~is~~ governed by this article. 8 A. 295 = 6 A.W.N. 98; 11 A. 428; 14 A. 1 = 11 A.W.N. 211; 6 A.W.N. 152; 11 B. 422; 6 A. 300.
- (d) Compare 3 A. 24 and 5 A.W.N. (1885), 300; U.B.R. (1892-96), 490 and 32 P.R. 1905 = 39 P.L.R. 1905.
- (e) Cf. 11 M. 416, which holds that, in the absence of proof that the redeeming co-mortgagor or persons holding under him held the land redeemed for more than 12 years with an adverse title, the plaintiff's suit would not be barred.
- (f) When a co-heir redeems he does not necessarily do so in opposition to the mortgagor, the result being that a suit against him by the mortgagor or his heir is governed by the 60 years' limitation in this article. U.B.R. (1897-01), 473.
- (g) See U.B.R. (1892-96), 500, No. 6, at p. 1108, *supra*.

(2) Possession obtained by one of the mortgagors :—

Where, after a usufructuary mortgage had been satisfied out of the usufruct, one of the mortgagors got possession of the whole of the mortgaged property, such possession was adverse as against the other co-mortgagors. 16 A. 254 = 14 A.W.N. 72.

(3) Transfer to co-sharer by Government—Nature of possession :

Where, in accordance with the *wajib-al-ars* of a village but not under S. 157 of Act XIX of 1873, the defendant's predecessor in title was placed in possession of a *patti* in the village under the order of an Assistant Collector, the dispossessed co-sharer having defaulted to pay Government revenue, and where the *wajib-al-ars* provided that the dispossessed co-sharer might recover the land from which he was dispossessed on payment of the Government revenue paid on his behalf, *held* the possession of the defendant was not adverse and that the transfer was a mortgage by conditional sale governed by the 60 years' rule of limitation. 1 A.L.J. 48.

(4) Mortgagor and mortgagee—Mortgagee's possession when adverse and when not :—

- (a) As between mortgagor and mortgagee, neither exclusive possession by the latter for any period less than 60 years nor any acquiescence by the former short of the release of the equity of redemption will be a bar or defence to a suit for redemption. 9 C.W.N. 201 = 2 A.L.J. 71 = 7 Bom. L.R. 1 (P.C.).
- (b) A mere denial by a mortgagee in possession of the mortgagor's title is not sufficient to convert his possession into adverse possession. 10 M. 189.
- (c) The mere denial by a mortgagee in possession, of the mortgagor's title, cannot abridge the period of 60 years within which the latter has to sue for redemption. 49 P.R. 1882.
- (d) Where a mortgagee pays the assessment due on the mortgaged land and he is put in possession by the Mamlatdar, his possession can't be adverse to the mortgagor, who might sue for redemption. 16 B. 184.
- (e) The mere assertion by the mortgagee of a title adverse to the mortgagor cannot cut down the period for redemption from 60 to 12 years, where there is a real mortgage. 7 N.W.P. 220 (F.B.); 1 A. 655.

1.—'Against a mortgagee.'—(Concluded.)

(f) Nor would the real owner be disentitled to redeem, where the mortgagee pretends to purchase the equity of redemption from a person having no title whatever. 21 B. 798.

(5) Mortgage by conditional sale—Adverse possession :—

Where a mortgagee by conditional sale takes possession of the mortgaged property, after the end of the mortgage term, in his own right and not as mortgagee, a suit for redemption will be governed by art. 144 and not by this article. 2 A.W.N. 87.

(6) Redemption suit—Adverse possession :—

Adverse possession against mortgagee is not necessarily adverse to mortgagor so as to bar him from redeeming a mortgage, the reason being that possession adverse to mortgagor can only arise after he becomes entitled to immediate possession, which, in the case of a usufructuary mortgage, he will not be entitled to until the mortgage is redeemed. 1 A.L.J. 725 = A.W.N. (1905), 4.

(7) Mortgagee can't set up adverse possession :—

(a) See 14 B. 279, No. 10, at p. 1056, *supra*.

(b) In the absence of a valid sale to him, a mortgagee or his heir cannot set up an adverse title, the possession under the mortgage retaining its original character. 14 M. 38.

(8) Mortgagee holding over :—

(a) The possession of a usufructuary mortgagee holding over, after the stipulated period, is not adverse to the mortgagor, who, in consequence, is entitled to a period of sixty years for redemption. 17 A.W.N. 214.

(b) The possession of a ——— after the period fixed for redemption is not adverse, the mortgagor being in a position to sue within 60 years for recovery of possession. 20 A. 115 = 17 A.W.N. 214.

2.—'to redeem.'

(1) Suit for redemption by purchaser of mortgagor's interest :—

The purchaser of the interest of the mortgagor in one of two villages mortgaged may redeem both the villages if the mortgagee so insists. 2 M. 228.

(2) Sub-mortgagee's suit for redemption :—

A sub-mortgagee, being the transferee of the interest of the original mortgagee, is entitled to redeem a prior mortgage. A.W.N. (1905), 58 = 2 A.L.J. 62 (overruling A.W.N. (1901), 159).

(3) Suit for redemption by purchaser of portion of equity of redemption :—

The purchaser of a portion of the equity of redemption can maintain a suit for redemption of that portion alone, where the mortgagee, having a knowledge of such purchase, obtains a foreclosure-decree without impleading the purchaser as a party to his suit. A.W.N. (1905), 139.

(4) Redemption by person not representative of mortgagor :—

The possession of a person who redeems a mortgage is not that of the mortgagor or the representative of the mortgagor, but is adverse to the

2.—'to redeem.'—(Continued.)

mortgagor and the period of limitation for a suit against him for redemption is only 12 years under art. 144, and not 60 years under this article. U.B.R. (1897-1901),*454; 464.

(5) Suit by some of several mortgagors :—

Some only of several mortgagors cannot sue for redemption of the entire property mortgaged on the ground of the satisfaction of the mortgage-debt out of the usufruct. They can sue for possession of their shares only by adding the co-mortgagors as parties to the suit. 7 A. 376.

(6) Laches—Estoppel :—

Mere laches on the part of a mortgagor cannot work a forfeiture of his right of redemption, where such exists, though laches may, in some cases, be evidence of the non-existence of such rights. 14 B.L.R. 386 = 23 W.R. 99 = 2 L.A. 49 (P.C.)

(7) Mortgagor's right to redeem before sale :—

A mortgagor has the right to redeem at any time before the actual sale, notwithstanding the fact that an order absolute for sale has been passed. 8 C.W.N. 684.

(8) Redemption-decree—Execution :—

Where a redemption-decree does not fix a time for payment of the amount decreed, the mortgagor may, even after the lapse of 3 years, execute the decree, by payment of the amount, for possession, provided he has kept the decree alive by applications at intervals of 3 years. 16 B. 480.

(9) Application for execution of redemption-decree—Non-payment in time :—

(a) Where a decree for redemption directs the payment of the decree-amount within a certain fixed time and the decree-holder fails to pay the amount within that date, an application to execute the decree at a later date will be barred. 13 M. 267 (*dissenting from* 16 C. 246); 19 M. 40 (F.B.)

(b) If, on default by the mortgagor to pay within time, the mortgagee obtained an order absolute of foreclosure without notice to the mortgagor, the latter may, if he secures an extension of time, make payment after the lapse of time originally fixed and regain possession. 22 M. 133.

(10) Decree not specifying result of non-payment :—

(a) Where, in a suit for redemption, the decree fixes a date for payment but omits to specify the result of non-payment within the date fixed, the decree-holder may execute the decree within the time fixed by art. 179 of the Limitation Act for execution of the decree. 14 A. 350. *But Cf.*, 14 A. 529.

(b) Where a decree, in a suit for redemption, does not contain a clause for payment within a fixed time or a proviso for foreclosure, it operates, of itself, as a foreclosure-decree. If the decree is not executed within 3 years as provided by art. 179, it would operate as a foreclosure-decree and would determine, for ever, the rights of the mortgagor as well as the mortgagee, so as to bar a second suit by either. 13 B. 567.

2.—'to redeem.'—(Continued.)

- (c) Where a decree for redemption omitted to state the consequence of non-payment of mortgage-money within the specified time, such omission did not extend the maximum term provided for by S. 92 of the Transfer of Property Act. 16 A. 65.

(11) Right of redemption—Foreclosure-decree :—

In a suit for foreclosure, the mortgagor can redeem at any time until the order absolute is made under S. 87 of the Transfer of Property Act. 16 C. 246; 27 C. 705.

(12) Second suit for redemption :—

- (a) A mortgagor, obtaining a decree for redemption but neglecting to execute the decree, cannot bring a second suit for redemption. 4 A. 481; 7 B. 467; 13 B. 567.

- (b) The dismissal of a suit for redemption on the ground of non-payment or the non-tender of the entire mortgage-money at the proper time, has not the effect of *res judicata* or foreclosure. A second suit for redemption may be maintained if, between the dismissal of the first suit and the institution of the second, the entire mortgage-money is paid or tendered at the time contemplated by the deed. 21 A. 251.

- (c) Where, in a suit for redemption, the mortgagor does not pay the amount decreed within the time limited by the decree, but the decree is not drawn up in accordance with the Transfer of Property Act, a second suit for redemption can be maintained. 24 A. 44 (F.B.).

- (d) Where, in a decree for redemption, there is no clause for foreclosure in the event of non-payment, the mortgagor may sue again for redemption, notwithstanding that he has not executed the decree for more than 12 years. 6 M. 119; 7 M. 423; 8 M. 478; 15 M. 366. Compare these cases with 25 M. 300 (F.B.), where it has been decided that a second suit for redemption will not be maintainable, where a decree for redemption passed in the first suit has remained unexecuted.

But see 7 B. 467; 13 B. 567; 4 A. 481.

(13) Merger of right of suit for redemption :—

Where a decree is passed on a mortgage to the effect that, an account being taken as to what is due, the mortgagor might tender the amount due at any time and recover possession, no second suit can be brought for redemption, but the decree first obtained ought to be executed. 10 B. 461 = 13 I. A. 66 (P.C.).

(14) Suit for redemption—Adverse possession against mortgagor and mortgagee.

- (a) See 1 P.L.B. 167, No. m (3) at p. 1103, *supra*.

- (b) See 18 B. 51, No. m (1), at p. 1103, *supra*.

(15) Extinction of equity of redemption—Adverse possession.

See 6 C.W.N. 601, No. 8, at p. 1086, *supra*.

(16) Suit for redemption—Burden of proof :—

- (a) In a—~~the~~ plaintiff must show that he had a subsisting title at date of suit, in default whereof he fails to prove his title or subsisting right to the property. If, however, a defendant sets up adverse possession.

2.—'to redeem.'—(Concluded.)

the original mortgage being admitted or proved, he must, in order to succeed, prove that the title of the plaintiff has been lost. 11 A. 438; 2 A.L.J. 62 = A.W.N. (1906), 14. Compare A.W.N. (1894), 14.

- (b) In a suit for redemption, the plaintiff ought to show that, at the date of suit, he had a subsisting title to redeem, notwithstanding the fact that the defendant fails to prove the special title set up by him. 9 A.W.N. 187.
- (c) Where a suit is brought for redemption of a mortgage, more than sixty years old, the plaintiff ought to prove the mortgage, the date thereof, and the fact that the period of redemption came within sixty years before suit. U.B.R. (1892-1896), 1467.
- (d) Where the plaintiff comes into Court for redemption of a mortgage of 100 years of age, he must prove the genuineness of the mortgage beyond the possibility of a doubt. The fact that the plaintiff is the tenant of the defendant cannot relieve him of his burden. U.B.R. (1892-96), 579.
- (e) Where, in a suit for redemption, limitation is set up as a defence, the plaintiff must first prove that he has a subsisting title to redeem unbarred by limitation, before the defendant can be called upon to prove his adverse possession. 88 P.R. 1893; 53 P.R. 1894.

(17) Redemption suit—Right to interest:—

Interest can be claimed by a mortgagee in a redemption-suit from the date of the bond up to the date of decree, however long such period may be, such a suit being governed, not by art. 182, but by this article. 14 B. 113.

3.—"When the right to redeem accrues."**(A).—Right to redeem before expiry of term.**

- (1) The general principle is that, in the absence of any stipulation, expressed or implied, to the contrary, the right to redeem and the right to foreclose are co-extensive. Where a date is fixed in the deed for redemption, no suit could be brought for redemption within that date, notwithstanding the fact that the deed mentions that the mortgage-amount is payable 'within' that date. 5 B. 22.

But cases falling under the Dekkhan Agriculturists' Relief Act are outside the above rule. 6 B. 734.

- (2) Where a mortgage is effected for a period, neither the mortgagee can sue, for the mortgage-money nor the mortgagor, for redemption before the expiration of that period. 8 A. 95.

- (3) The above rule would hold good only when the mortgagee can show that he is entitled to decline to receive payment before the expiry of the period fixed or the deed expressly states that the mortgage is redeemable only after the expiry of the term. There is no inflexible rule in India that a mortgage can't be redeemed before the term fixed. 30 A. 602.

(4) Cf. M. 814, which holds that the creation of a term is not conclusive evidence that redemption should not take place before the expiry of the term. It depends more or less on the intention of the parties.

3.—“When the right to redeem accrues.”—(Continued.)

(B).—Acknowledgments and their effect.

(Note) The third column of this article must be read subject to the provisions of S. 19 of the Act relating to acknowledgments. *

(1) Effect of acknowledgment :—

If, within 60 years from the date of an original mortgage, the mortgagee acknowledges the title of the mortgagor and the subsistence of the original mortgage, the mortgagor may sue for redemption within 60 years from the date of the acknowledgment. 6 Bom.L.R. 38. *Cf.*, 1 C.W.N. 569.

(2) Acknowledgment, nature of :—

(a) To be within *section 19*, an acknowledgment must be of a present existing title in the mortgagor. An acknowledgment, which recited the original mortgage but asserted a subsequent alteration of the original arrangement and the constitution of a fresh relationship between the parties, even though within sixty years of the original mortgage, was held insufficient to give a fresh starting point. 9 C. 616—12 C.L.R. 284.

(b) The Limitation Act did not require that an acknowledgment should be made to any particular person or at any particular time before the institution of the suit in which the bar by limitation is pleaded. 6 M. H.C. 267.

(c) An acknowledgment, by a mortgagee, to the effect that the estate in his possession was a mortgage-tenure recorded and signed in the settlement-record would give a fresh starting point for redemption, even though the mortgagor's name was not mentioned therein. 1 A. 117 (F.B).

But see 5 M. 182.

(3) Acknowledgment, to be effectual, when to be made :—

An acknowledgment, to be effectual, must be made within the period of sixty years from the mortgage. 6 M.H.C.R. 138; 3 N.W.P. 119; 19 W. R. 78.

(4) Acknowledgment before Act XV of 1877 :—

* In a suit for redemption instituted after Act XV of 1877 coming into force, on a mortgage executed more than sixty years before 1877, there must, in order that it might succeed, be an acknowledgment sufficient, under Act IX of 1871, to give a fresh start of limitation. 58 P.R. 1894.

(5) Effect of erroneous date in acknowledgment :—

The mere fact that, in an acknowledgment of a mortgage, the date of the mortgage is stated erroneously, cannot take away from it its efficacy under S. 19 of the Act. 1 A. L. J. 1. *

(6) Acknowledgment of right of Redemption :—

The mortgagor or his representatives may sue for redemption, if the mortgage has not been put an end to, and the suit is brought within sixty years from the last acknowledgment by the mortgagee of the mortgagor's title. 10 W. R. 478.

3.—“*When the right to redeem accrues.*”—(Continued.)

(B).—Acknowledgment and their effect.—(Concluded.)

(7) Acknowledgment—Acceptance of sale certificate :—

The acceptance, by an auction-purchaser, of the interests of a mortgagee's interests, is not sufficient to constitute such an acknowledgment of the mortgagor's title as to give a fresh start of limitation for redemption. 6 M. 325.

(8) Acknowledgment in mortgagee's will :—

An —held sufficient to give a fresh starting point of limitation. 16 M. 366.

(9) Acknowledgment by Agent :—

An —was ineffectual for purposes of giving a fresh start of limitation under the Act of 1871 or that of 1859. 85 P. R. 1880; 157 P. R. 1888.

(10) Acknowledgment to whom to be made :—

(a) An acknowledgment must, in order to fall within S. 19 of the Act, be an acknowledgment of liability and must be made to the person seeking recovery of property or some person, through whom he claims. 14 C. 801 = 14 I. A. 168 (P.C.).

(b) But see 3 W.R. 3; 5 B.H.C.A.C. 176; 4 M.H.C. 359 and 3 N.W.P. 78, which decided that acknowledgment, even to a third person, was sufficient under s. 1, cl. 15 of Act XIV of 1859. Cf. 6 M.H.C. 267.

(11) Acknowledgment by one of several mortgagees :—

An— or by some only out of several heirs of the mortgagee, even if he or they make such acknowledgment as the agent or agents of the other co-mortgagees, is ineffectual for purposes of giving a fresh start of limitation. 17 B. 173; 18 A. 458; 157 P.R. 1888; 1 A.L.J. 355.

(12) Redemption of mortgage—No acknowledgment :—

Mortgage in 1783. Suit for redemption in 1893, there being no evidence of acknowledgment, held barred under cl. 15 of s. 1 of Act XIV of 1859, and s. 29 and art. 148 of Act IX of 1871. 27 C. 1004 = 27 I.A. 103 = 4 C.W.N. 565 (P.C.).

(C).—Effect of S. 20.

(1) No extension of time in favour of mortgagor :—

S. 20 of this Act applies only in favour of a usufructuary mortgage to extend the time within which he may enforce his claim to the debt due on the mortgage. It does not apply to the case of a mortgagor for redemption of a usufructuary mortgage. 26 A. 167; 18 A. 295; 115 P.R. 1883; A.W.N. (1894), 87, *dissented from*.

(2) S. 20 compared with this article :—

S. 20 of this Act has not the effect of indefinitely extending the period within which a usufructuary mortgage may be redeemed. 18 A. 295; 115 P.R. 1883; A.W.N. (1903), 223.

3.—“When the right to redeem accrues.”—(Concluded.)

(C).—Effect of S. 20.—(Concluded.)

(3) Effect of receipts of rents and profits:—

- (a) The receipt by a mortgagee of land or produce thereof has the effect of payment for purposes of s. 20 of the Limitation Act. 13 M.L.J. 83.
- (b) A mere receipt of rents and profits by a co-owner from the mortgagee for more than 12 years would not establish a right on the part of such co-owner to the property mortgaged. 7 M. 26.

(D).—Fresh advances, effect of, in Upper Burma:—

- (1) There is a practice in Upper Burma of making further advances on usufructuary mortgages as land becomes better cultivated and more valuable. Such fresh advances have the effect of giving a fresh start of limitation for redemption. U.B.R. (1892-96), 522.
- (2) The fresh advances, when relied upon, for taking a suit out of the bar by limitation, must be strictly proved and the evidence must be carefully tested and considered. U.B.R. (1892-96), 524.
- (3) Where the fresh advances are alleged by defendant to have been made on lands other than those originally mortgaged, it is for the defendant to prove the allegation. U.B.R. (1892-96), 473.

(E) Suits relating to mortgages in Upper Burma:—

See U.B.R. (1892-96), 509 and 516, No. 7th and also U.B.R. (1897-1901), 454, 464 and 469, No. 4, at p. 1104, *supra*.

4.—“Proviso.”

(1) Applicability to Upper Burma:—

The proviso has no application to Upper Burma. The proviso merely saved certain rules of limitation in force in Lower Burma up to the 1st May, 1863. Such rules were never in force in Upper Burma. In Upper Burma, as in India, the period of limitation for a suit for redemption is 60 years from the date of the accrual of the right to redeem. U.B.R. (1892-96), 524.

(2) Mortgage before 1863:—

- In suits for redemption of a mortgage executed before 1st May, 1863, the period of limitation was 12 years' adverse possession by the mortgagee. L.B.R. (1872-92), 43.

(Old Law).

(1) Suit for redemption of old mortgage:—

A— was held governed by S. 18, cl. 4 of Madras Regulation II of 1802, notwithstanding the fact that the possession of the mortgaged premises was with an assignee of the rights of the mortgagee, but not to the knowledge of the mortgagor. 1 M.H. C. 146.

(2) Suit for redemption when to be brought:—

A suit for redemption of immovable property mortgaged ought to be brought within 60 years from the date of the original mortgage. 10 W.R. 219.

(Old Law).—(Continued.)

(3) Suit for redemption—Title of mortgagee :—

The period of limitation for redemption was 60 years, whatever might be the nature of the title set up by the mortgagee (*s.g.*) even if the mortgagee were to set up a title inconsistent with the mortgage. 3 M.H.C. 137.

(4) Suit for redemption—Gahan lahan mortgage :—

A suit for redemption of a *gahan lahan* mortgage, even where the mortgagee had possession for more than 12 years after the date on which the mortgage was, according to the deed or mortgage, to become an absolute sale, was governed by s. 1, cl. 15 of Act XIV of 1859. 9 B.H.C. 69; 9 B.H.C.A.C. 79; 1 B.H.C. 199; 8 B.H.C.A.C. 236.

(5) Suit for redemption—Trespasser's possession against mortgagee :—

A suit for redemption, even where the property was in the possession of a trespasser asserting a title by adverse possession against mortgagee and mortgagor, was governed by the 60 years' rule in s. 1, cl. 15 of Act XIV of 1859. 12 B.H.C. 180.

(6) Acknowledgment before Act XIV of 1859 :—

There was no limitation to suits for redemption before Act XIV of 1859. So, an acknowledgment, in 1841, of a mortgage, date whereof could not be ascertained, was held sufficient to save a suit for redemption brought within sixty years from 1841. 1 A. 425.

But *Cf.* 109 P.R. 1884, which holds that the acknowledgment in order to give a fresh start of limitation must be made within sixty years from the date of the original mortgage.

(7) Acknowledgment of mortgage by agent :—

Case in which it was decided that an—was insufficient to give a fresh starting point of limitation for a suit for redemption. 13 B.L.R. 177 (P.C.) = 20 W.R. 358; in lower Court 12 W.R. 443; 1 A. 642. 1 C.W.N. 513; on appeal to (P.C.) 27 C. 1004 = 27 I.A. 108 = 4 C.W.N. 565 (P.C.); 1 A.L.J. 355.

(N.B.) :—It has to be borne in mind that the Act of 1859 did not contain a provision for acknowledgment by agents. *Vide*, on this point, cases noted under the Heading 'Acknowledgments by Agents before Act IX of 1871,' at p. 538, *supra*.

(8) Scope of cl. 15—Acknowledgment by whom to be signed :—

S. 1, cl. 15 embraced every kind of mortgage including usufructuary mortgages. The acknowledgment referred to in the section had to be signed by the mortgagee himself, his agent's signature not being sufficient. 20 W.R. 375 (P.C.).

(9) Acknowledgment by Hindu father of a joint Hindu family :—

An—was sufficient under art. 148 of Act IX of 1871 to give a fresh start of limitation for a suit for redemption against the sons. 62 P.R. 1900.

(10) Permissive occupation—Suit for possession :—

A suit by owner for possession of premises in the permissive occupation of the heirs of the person originally let into possession was governed by s. 1, cl. 12 and not by s. 1, cl. 15, of Act XIV of 1859. 4 B.H.C.A.C. 155.

(Old Law).—(Concluded.)

(11) Mortgagor's suit for possession on satisfaction of mortgage :—

A—was governed by s. 1, cl. 15 of Act XIV of 1859. B.L.R. Sup. Vol. 901 = 9 W.R. 187.

(12) Relationship of trust :—

S. 1, cl. 15 of Act XIV of 1859 applied, where there was some relation of trust, whether the property was given in mortgage or pawn or simply deposited for safe custody. 3 W.R. 94.

(13) Rights of purchaser of mortgagor's rights :—

Where a creditor of a mortgagor purchases the rights of the latter and the estate purchased was in the possession of a mortgagee, it was held that the purchaser's suit for possession against the mortgagee was not governed by s. 1, cl. 15 of Act XIV of 1859. 18 W.R. 78.

(14) Right of redemption when barred :—

(a) The lapse of more than 12 years from the year of grace bars the right of redemption. 8 W.R. 476.

(b) The expression 'some persons claiming under him' in art. 148 of Act IX of 1871, means some person claiming under the mortgagee the entirety of his rights. 17 B. 173.

149.—Any suit ⁽¹⁾ by or on *Sixty years.* When the period of behalf of the Secretary limitation would of State for India in begin to run under Council ⁽²⁾. this Act against a like suit by a private person.

(Old Acts.)

[Art. 150, Act IX of 1871 :—Any suit in the name of the Secretary of State for India in Council—Sixty years—When the right to sue accrued.

S. 17, Act XIV of 1859 :—*This Act shall not extend to any public property or right, nor to any suits for the recovery of the public revenue or for any public claim whatever, but such suits shall continue to be governed by the laws or rules of limitation now in force.*

Bengal Regulation II of 1806 provided a period of sixty years for suits by Government in regard to public claims or rights.

This Regulation was repealed by Act VIII of 1868, without any reference to S. 17 of Act XIV of 1859.]

(Notes)

Scope of article.

(1) Exercise by Government of its prerogative :—

There is no limitation for the Government's exercising its prerogative of imposing assessment on land liable to be assessed to public revenue. 27 M. 16.

Scope of article.—(Concluded.)**(2) Prerogative of the Crown—Court-fees :—**

S. 309, Act VIII of 1859 did not preclude the Crown from enforcing its first claim to the proceeds of a pauper suit to the extent of the Court-fee leviable. It might exercise its prerogative at any time. 1 B. 7.

Cf. Nos. 1, 2, 3 under heading No. 1 and No. 3 under heading 'Old Law,' *infra*.

(3) Whether Crown is affected by Statutes :—

The rule of construction according to which the Crown is not affected by a Statute, unless specially named in it, applies to India. 14 B. 213.

1. 'Any suit.'**(1) Exemption of Government regarding applications :—**

(a) The Government is not entitled to any exemption from the provisions of the Indian Limitation Act relating to applications. 4 M. 155.

(b) Government is bound to make an application for execution within the same time as any other person. 22 W.R. 512.

(2) Right of Government to recover Court-fees :—

The right of Government to recover Court-fees under S. 309 of Act VIII of 1859, was subject to the same period of limitation as the right of a subject to enforce a decree or order was. 7 B. 552 (Note).

(3) Sales under Bhagdari Act :—

It is doubtful whether the law of limitation applies to applications to set aside Court-sales under the Bhagdari Act. 7 B. 542.

2.—'By or on behalf of the Secretary of State for India in Council.'**(1) Suit for recovery of property of Government :—a**

Possession of a defendant for a period of 12 years, though it would be sufficient to bar a claim by any other party, would not exclude a claim by the Crown to recover what could be shown to be Government property. 19 C. 312 (321)=19 I.A. 69 (P.C.).

(2) Enfranchisement of Inam :—

Government can enfranchise an inam and grant a valid title in the land to the Inamdar, unless its right to do so is affected by adverse possession for 60 years on the part of any other person. 9 M.L.J. 141.

(3) Suit by Municipality :—

The article is inapplicable to a—19 M. 165; 19 M. 154.

(N.H.).—A private individual might, as against a Municipality, acquire a title by prescription by more than *twelve years'* adverse possession. 19 M. 154.

Note (a).—Now thirty years. *Vide* art. 146-a, *supra*, and compare 25 M. 635=12 M.L.J. 37, at p. 1118, *supra*.

(4) Vendors from Government :—

A—of its rights in a *Khas mahal* cannot claim the benefit of the sixty years' limitation. 20 W.R. 231; 24 W.R. 64.

2.—‘By or on behalf of the Secretary of State, &c.’—(Continued.)

(5) Lessee under Government :—

A—cannot claim the benefit of sixty years' limitation. 1 B.L.R.A.C. 84 = 10 W.R. 76.

(6) Suit by purchasing agent of Government :—

A-suit by a purchasing agent of Government to recover certain sum of money alleged to be due to him for the purchase of stores by Government brought more than three years after the termination of the plaintiff's agency and more than three years after the last supply made by him as purchasing agent but within a few months after the final refusal of the Commissariat Department was barred by art. 115. 14 C. 256.

(7) Suit by purchaser of a khas mahal from Government :—

Where the plaintiff purchased a *khas mahal* in the possession of Government at an auction-sale held by the Collector and at that time, the defendants held an *ijara* for a term of years, the cause of action for a suit by the plaintiff to recover possession of the property purchased by him arose on the expiration of the *ijara*, whether art. 139 or 141 applied to the suit. 9 C. 367 = 12 C.L.R. 19.

(8) Suit by Mutwalli of religious endowment :—

(a) A *mutwalli* of a religious endowment is not an officer of Government, since the passing of Act XX of 1863. He cannot, in a suit for recovery of property on behalf of the endowment, claim the benefit of the sixty years' limitation. 17 W.R. 430.

(b) (*N.B.*) :—Before Act XX of 1863, a *mutwalli* was considered an officer of Government and a suit by him was considered a 'public right' or 'claim' within the meaning of S. 17 of Act XIV of 1859. See 2 M.I.A. 390, at p. 423 = 6 W.R. 3 (P.C.).

(c) Since the passing of Act XX of 1863, the manager of a religious endowment cannot be held to be a procurator of Government and a suit by him, for the protection of the endowed property, cannot be regarded as a suit on behalf of Government. 20 A. 484 (488).

(9) Disputes of private owners—Right of Government :—

A dispute between two private owners regarding land cannot divest the title of either to the land, in favour of Government, simply because the latter has a right to the rent or *jumma* or because it makes common cause with one of the parties. 11 M.I.A. 845 = 7 W.R. 21 (P.C.).

(10) Suit by Government—Right to julkar :—

A suit by Government to establish its right to a *julkar*, brought after sixty years' adverse possession against it, held barred. 5 W.R. 115.

(11) Suit for maintenance of a ghatwali tenure :—

A suit by Government for the maintenance of a ghatwali tenure in which an alteration had been effected by fraud of a Zemindar was held governed by sixty years' limitation. 18 W.R. 120.

(12) Suit by Government against ghatwals :—

In a—who were found to be in possession for a very long time but short of sixty years, it was held that the onus of proving possession within sixty years lay on Government. 5 W.R. 136.

2.—'By or on behalf of the Secretary of State, &c.'—(Concluded.)

(13) Suit for resumption of lakhiraj land :—

In a—by Government, the defendant will succeed if he can show that the land was in his possession as *lakhiraj* for the sixty years before suit. 8 C. 230=10 C.L.R. 41.

(14) Suit to recover residue of sale proceeds :—

A suit to recover the residue of the sale proceeds of an estate sold for arrears of Government revenue is governed by art. 120. 20 C. 51 (F.B.) *overruling* 18 C. 234.

(15) Suit for forest lands.—Burden of proof :—

In a suit for forest lands, where adverse possession is set up by defendant—the Government—the latter ought to prove that it exercised proprietary rights within sixty years prior to suit or that the adverse possession of the defendant commenced within such sixty years. 9 M. 175.

(16) Possession of forest reserve as against Government :—

Where, in a suit to recover possession of certain land constituted by Government as reserved forest, it was proved that the plaintiff was in possession thereof for more than sixty years, the plaintiff's claim was allowed. 15 M. 315.

(17) Suit against Government :—

(a) A suit against Government to recover the penal assessment levied under Act VI of 1867 was governed by the six months' rule contained in S. 31 of the Act. 22 M. 100.

(b) Where, in a suit against the Secretary of State to recover possession of a *khoti* village, it appeared that Government was in possession of the rights to which the suit related for more than fifty years, the suit was barred. 24 B. 23.

(Old Law).

(1) Regulation II of 1805, S. 3, cl. 3 (Bengal) :—

Possession for sixty years was a bar under—not only to past arrears of rent but to future assessment of rent. 8 W.R. 232.

(2) Suit by East India Company for costs :—

A—incurred in bringing an appeal to hearing before the Judicial Committee of the Privy Council held not a 'public right' within the meaning of cl. 2, S. 2 of the Bengal Regulation II of 1805, which allowed a period of sixty years for enforcement of a public right. 3 W.R. 31=8 M.I.A. 225 (P.C.).

(3) Recovery of stamp-duty :—

A suit by Government for—in a pauper suit, dismissed five years before such suit, held to be governed by S. 17, Act XIV of 1859, being a 'public claim,' within the meaning of the section. 8 M. H. C. 40; compare 11 W.R. 67=2 B.L.R. Ap. 22.

Second Division—Appeals.

150.—Under the Code of Criminal Procedure, 1882, from a sentence of death passed by a Sessions Judge. *Seven days.* The date of the sentence.

(Old Acts).

[No corresponding provision in either of the old Limitation Acts.]

151.—From a decree or order *Twenty days*⁽¹⁾. The date of the decree of any of the High Courts of Judicature at Fort William, Madras and Bombay, or the Chief Court of the Panjab, or the Chief Court of Lower Burma ^(a) in the exercise of its original jurisdiction. or order.

(Old Acts).

[No corresponding provision in either of the old Acts].

(Notes)

1.—‘Twenty days.’

(1) Exclusion of time for obtaining copy:—

The time occupied by an application for copy of the judgment appealed against and the delay in the issue thereof ought to be excluded in calculating time for appeals under this article. 28 B. 643.

(2) Cause of delay when to be stated:—

The cause of delay in the presentation of a time-barred appeal ought to be stated at the time when the appeal is filed. 22 P.R. 1903=91 P.L.R. 1903.

(3) Non-signing of decree:—

The delay occupied by the non-signing of the decree, after the pronouncement of the decree, ought not to be excluded in favour of the appellant. 23 B. 442.

But see 13 C. 104 (F.B.) and 12 A. 461 (F.B.)=10 A.W.N. 149, which hold that the time between the passing of the judgment and the signing of the decree ought to be excluded. Compare 13 C. 653.

(N.B.)—See, further, cases Nos. 5, 6 and 7, at p. 595, *supra*, under S. 12.

(4) Appeal under Divorce Act:—

An appeal under the Indian Divorce Act (IV of 1869) against a decree absolute is governed by this article. 22 B. 612.

152.—Under the Code of Civil *Thirty days* ⁽¹⁾ The date of the decree ⁽²⁾
 Procedure to the Court or order appealed
 of a District Judge. against.

(Old Acts).

[Art. 151 of Act IX of 1871 :—Cols. 1 and 2 same as above. Cpl. 3.—The date of the decree appealed against.

Act XIV of 1859 :—No corresponding provision].

(Notes)

Scope of article.

Under this article an appeal to the District Court should be preferred within 30 days from date of decree. U.B.R. (1892-96), 525.

1. 'Thirty days.'

(1) Period of limitation expiring during holidays :—

As to the period of limitation expiring during holidays and application for copies being made on the re-opening of the Court and the appellant's right to claim exclusion of holidays from calculation, see No. 1 (c), under the heading "2.—Time requisite, &c.," at p. 594 and 12 (a), under the same heading, at p. 596, *supra*.

(2) Time to be excluded :—

The only time that can be excluded in calculating the period of limitation is that between the application for copies of judgment or order and decree and that of the issue of the copies. The time occupied by the non-signing of the decree can't be excluded. 23 B. 442.

But see 13 C. 104 (F.B.) noted under the last article.

(3) Computation of period :—

In computing the period of limitation for an appeal, the time between the delivery of the judgment and that of the signing of the decree should be excluded. 13 C. 104.

2.—'The date of the decree.'

(1) ——— is the date which the law (S. 205, Civil Procedure Code) directs it to bear (i.e.) the date of the judgment. 25 C. 109.

(2) Preliminary decree in a partition or partnership suit :—

Notwithstanding the fact that no appeal is preferred in time against a preliminary decree in a partition or partnership suit, the correctness and propriety thereof may be questioned in the appeal from the final decree. 29 C. 758 (F.B.); 23 C. 406 (*overruling* 23 C. 279).

(3) Effect of amendment of decree :—

Where a decree is, after it is passed, amended, the period of limitation for appeal may be calculated from the date of the amended decree. 32 C. 908 (Current Index, Limitation Act).

2. - 'The date of the decree.'--(Concluded.)

(4) Review only rectifying clerical mistake—Appeal :—

As appeal can be preferred within thirty days of an order made upon an application for a review of judgment, even though the order extended only to the rectification of a clerical mistake. 6 C. 22=6 C. L.R. 575.

153.—Under the same Code, *Thirty days*. The date of the order, section 601, to a High Court, refusing the certificate.

(Old Acts).

[*No corresponding provision in either of the Old Acts*].

154.—Under the Code of *Thirty days*. The date of the sentence or order appealed against. Criminal Procedure, 1882, to any Court other than a High Court.

(Old Acts).

[Act IX of 1871, art. 152 :—Same as above.

Act XIV of 1859 :—*No corresponding provision.*]

(Note)

See notes under the next article.

155.—Under the same Code to a *Sixty days*. The date of the sentence or order appealed against. High Court, except in the cases provided for by No. 150 and No. 157.

(Old Acts).

[Act IX of 1871, art. 153 :—Col. 1—Under the same Code, to the High Court. Cols. 2 and 3—same as in the present Act.

Act XIV of 1859 :—*No corresponding provision.*]

(Notes)

Scope of article.

(1) Criminal appeals :—

S. 5 is applicable to criminal appeals. 11 A. 10.

(2) Appeal to High Court in extradition cases :—

An appeal presented to the High Court under the Extradition Act is not governed by this article. 15 M. 414.

(3) Criminal appeal—Prisoner in jail :—

The presentation, by a prisoner in jail, of an appeal memorandum to the jailor, is tantamount to presentation to Court for purposes of limitation. 9 M. 258.

**Act XV of 1877 (INDIAN LIMITATION ACT): [Art. 156
(Old Law).**

Appeal against acquittal : -

An appeal by the local Government, under S. 372, Criminal Procedure Code (Act X of 1872), was within time if presented within six months from the date of the acquittal. The sixty days' rule does not apply. 2 C. 436 (F.B.)

- 156.—Under the Code of *Ninety days*. The date of the decree Civil Procedure ⁽¹⁾ to a High Court except in the cases provided for by No. 151 and No. 153. or order⁽²⁾ appealed against.

(Old Acts).

[Act IX of 1871, art. 168 :—To a High Court for the admission of a special appeal—Ninety days—The date of the decree appealed against.
Act XIV of 1859 :—No corresponding provision].

(Notes).

Scope of article.

(1) Second appeal under the Burma Courts Act :—

A — is not subject to the limitation provided by this article. 10 C. 946.

(2) Appeal from decision of Recorder of Rangoon :—

An appeal from the Court of the Recorder of Rangoon to the High Court at Calcutta had to be made within the time prescribed by this article. 18 C. 221.

(3) Appeal to Judicial Commissioner, Central Provinces :—

The period of limitation for an appeal to the Court of the Judicial Commissioner, Central Provinces, is 90 days. To entitle a would-be appellent to have the interval between the date of judgment and the actual signing of the decree deducted the application for copy must have been put in before the signing of the decree. 13 C.P.L.R. 78.

1.—'Under the Code of Civil Procedure.'

The words—exclude from their operation appeals under the Letters Patent; such appeals do not fall within the scope of the article. They are governed by the Rules of Practice framed by the several High Courts. *Vide* 9 A. 116 (F.B.); 11 W.R. 107; 12 W.R. 458 = B.L.R. 47 and 2 A. 122 (F.B.)

2.—'The date of the decree or order.'

(1) When time begins to run :—

Under S. 12, the time requisite for applying for a copy of the decree begins only when a step has been taken to obtain the copy. A party may apply for a copy of the decree before it is drawn up and signed. 3 L.B.R. 62 (F.B.)

2.—'The date of the decree or order.'—(Concluded.)

(2) Application for review :—

The mere presentation of an application for review, where it is not shown that the grounds therefor are reasonable and proper, is not sufficient reason for admitting an appeal after the period of limitation prescribed for such appeal has passed. 15 C. 242.

(3) Effect of omission to appeal against remand order :—

The omission to appeal against a remand order of a lower appellate Court holding the suit not barred and remanding it to the Court of first instance would not preclude the defeated party from challenging the lower appellate Court's decision on the question of limitation in the second appeal against its final decision on the merits. 5 W.R. 91 (F.B.).

(4) Order refusing to make a person defendant :—

Time for an appeal from an order disallowing the objection by a party to being made a defendant to a suit begins to run from the date of his or her being made a party. 8 A.W.N. 8.

157.—Under the Code of Criminal Procedure, 1882, from a judgment appealed against. *Six months.*

(Old Acts).

[No provision exactly corresponding to the above article in either of the old Acts].

(Note)

See 2 C. 486 (F.B.) noted under arts. 155 & 154, *supra*.

Third Division—Applications.

158.—Under the Code of Civil Procedure to set aside an award ⁽¹⁾. *Ten days.* When the award is submitted to the Court. ⁽²⁾

(Old Acts).

[Act IX of 1871, art. 155 :—Cols. 1 and 2 same as above. Col. 8—When the award is submitted to the Court, and notice of the submission has been given to the persons and in the manner prescribed by the High Court.

Act XIV of 1859 :—No corresponding provision].

(Notes)

1.—'To set aside an award.'

1) Application to set aside award :—

An—on the ground that three out of five arbitrators were not present at the time of the award is governed by this article. 29 C. 36.

1.—‘To set aside an award.’—(Concluded.)

(2) Application under s. 622, C.P. Code:—

Where a decree is passed by a Court in accordance with an award, an application by the unsuccessful party to the High Court (in this case the Chief Court of the Punjab) under s. 622 of the Civil Procedure Code is virtually an application to set aside an award and as such is governed by this article. 29 C. 167=12 M.L.J. 77=6 C.W.N. 226 (P.C.).

(3) Effect of omission to apply under the article:—

- (a) The mere fact that a defendant did not apply under this article to set aside an award submitted to the Court would not preclude him from appealing against a decree passed on such award. 8 A. 64=6 A.W.N. 2; 2 O.C. 355.
- (b) But compare 124 P.R. 1889, which holds that, if a party to an award of arbitration fails to apply to set it aside within the time limited by this article, he cannot afterwards be heard to impeach it even on the ground of fraud because the Court has no power to extend the time allowed by this article. (See the same case cited in Rivaz's Limitation, p. 262).

2.—‘When the award is submitted to Court.’

Commencement of time:—

An application to set aside an award must be made within ten days from the time the award arrives at the Registrar's office for the purpose of being filed, and not from the time when it is filed. 5 C.W.N. 813.

159.—For leave to appear and defend a suit under Chapter XXXIX of the Code of Civil Procedure. *Ten days.* When the summons is served⁽¹⁾.

(Old Acts).

[No corresponding provision in either of the old Acts.]

(Notes)

1.—‘When the summons is served.’

(1) Right to question date of service:—

The only date to which preference could be made, as regards limitation, is the date shown in the sheriff's return. The defendant can't be allowed to go into the question whether the summons was served on the date mentioned in the sheriff's return or not at all. 23 C. 573.

(2) Power to extend time:—

In a suit under Chapter XXXIX, Civil Procedure Code, the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time. 5 C.W.N. 259.

Quære:—Whether the Court has power to grant an extension of time if an application for such extension be made before the time fixed by the summons has expired? 5 C.W.N. 259.

160.—For an order under sec- *Fifteen days.* When the application
tion 629 of the same for review is reject-
Code restoring to the file ed.
a rejected application for
review.

(Old Acts).

[No corresponding provision in either of the old Acts.]

160A.—For a review of judg- *Fifteen days.* The date of the decree
ment by a Provincial or order.
Court of Small Causes or
by a Court invested with
the jurisdiction of a Pro-
vincial Court of Small
Causes when exercising
that jurisdiction.

161.*—

162.—For a review of judgment *Twenty days.* The date of the decree
by any of the High or order.
Courts ⁽¹⁾ of Judicature
at Fort William, Madras
and Bombay, "or the
Chief Court of the Pun-
jab," or the Chief Court
of Lower Burma in the
exercise of its original
jurisdiction.

(Old Acts).

[No corresponding provision in either of the old Acts.]

(Note).

1.—'High Courts.'

Matrimonial jurisdiction:—

The judgment of a High Court in the exercise of its matrimonial jurisdiction is a
judgment of the High Court in its original jurisdiction. An application,
therefore, in relation to such a matter is governed by this article.
6 B. 416 (484).

163.—By a plaintiff for an *Thirty days.* The date of the dismis-
order to set aside a sal.
dismissal by default ⁽¹⁾.

*—Art. 173 A has now taken the place of this article. For cases under this
article, refer to cases under 173A, *infra*.

(Old Acts).

[Art 156, Act IX of 1871 :—Same as above, except that in cols. 1 and 8 of the old Act, the word "judgment" was to be found instead of the word a "dismissal" in the present article.

Act XIV of 1859 No corresponding provision]

(Notes)

Scope of article

(1) Application for review—Dismissal by default :

Where a suit is dismissed for default of plaintiff's appearance and the plaintiff applies for a review of judgment more than thirty days from the date of the dismissal, his application would be governed by this article 15 P R 1897

(2) Notice of motion not application :—

The application must be made within 30 days from the date of the dismissal. A mere notice of motion will not prevent time from running. When the long vacation intervenes, the matter must be mentioned on the very first day of the re-opening (i.e.) the first day on which the Court sits. 81 C. 150—8 C W N 97. Compare 20 C 899

(3) Court's power to extend time :—

The Court has no power to extend the time allowed by this article. If a suit is dismissed for default and the plaintiff applies, under S 103, C P. Code, for an order to set aside the dismissal more than thirty days from the default, the Court ought to dismiss the petition. 89 P R. 1902, 141 P R 1879.

1.—'By default.'

Appearance only for applying for adjournment :—

(a) Where a pleader for a defendant appears only for asking for an adjournment and, it being refused, he retires from the case, the judgment that follows is an *ex parte* judgment. 8 C W N 621 (*dissenting* from 27 C. 529). Compare 22 A 66

(b) The 'appearance' of a pleader only for the purpose of applying for an adjournment and without instructions to proceed with the case, ~~is not~~ appearance and when, such application, being refused, he retires from the case and a judgment dismissing the suit follows, the judgment is one by 'default' within the meaning of this article. 22 A. 66 (22 A. 195, 28 B 414). Compare 3 A. 519

104.—By a defendant for an ~~order to set aside a~~ ~~judgment *ex parte*.~~⁽¹⁾ ~~The date of executing any process for enforcing the judgment.~~⁽²⁾

(Old Acts).

[Act IX of 1871: art. 157 :—Same as above except that in the last column there were the words 'execution of' instead of the word 'executing' in the present article.

(Old Acts.)—(Concluded).

Act XIV of 1859 :—No corresponding provision.

S. 119 of Act VIII of 1859 (Old Civil Procedure Code) provided that an application to set aside an *ex parte* decree must be made "within a reasonable time not exceeding thirty days after any process for enforcing the judgment has been executed, &c.]"

(Notes)

Scope of article.

(1) Application before execution not prohibited:—

The article does not prohibit the reception of an application before the commencement of execution-proceedings. 152 P.R. 1879.

(2) Power of appellate Court:—

In an appeal from an order under S. 108, C.P. Code, refusing to set aside an *ex parte* decree, the appellate Court can only remand the application under S. 108 of the Civil Procedure Code, and not the original case, the decree in which is sought to be set aside. 5 C.W.N. 153 (P.C.).

(3) Extension of time :—

The Court has no jurisdiction to extend the time allowed by this article; 8 B. H.O.A.C. 44; 26 W.R. 99; even if it should be proved that defendant-applicant knew of the execution within thirty days of his application. 32 P.R. 1878.

(4) Applicability to appeals :—

The provisions of this article do not apply to appeals. So, a dismissal of an appeal, the *pleader* saying that he had no instructions and the application made by him for adjournment having been dismissed, is not governed by this article. 27 C. 529.

(5) Decree against several persons :—

Where there is a joint and indivisible decree against several persons, and where one of them applies to have it set aside on the ground that it was *ex parte*, it may be set aside in its entirety and the whole suit must be re-heard; the case may be different where the decree against several persons is separable. 24 A. 383. Compare 25 A. 42 (more especially remarks at p. 44).

(6) *Ex parte* decree of Presidency Small Cause Court:—

An application to set aside an *ex parte* decree passed by a Presidency Small Cause Court is governed by this article. 17 B. 507.

I.—'Judgment *ex parte*.'(1) *Ex parte* judgment at adjourned hearing:—

The article will apply to a case decided *ex parte* at the first hearing as well as to one decided *ex parte* at an adjourned hearing. 23 C. 738 (F.C.), overruling 21 C. 369.

1.—'Judgment *ex parte*.'—(Concluded.)

(2) Retirement of pleader:—

- (a) Where the pleader for the defendant says, on the date of hearing, that he has no instructions and retires from the case and a judgment follows, such judgment is an *ex parte* judgment. 20 A. 196.
- (b) Compare 2 A. 67 = 5 I.A. 233 (P.C.), which decided that, for purposes of an appeal, under the old Civil Procedure Code of 1859, an *ex parte* judgment meant a judgment against a defendant, who did not appear at all but not to one against a defendant, who once appeared but did not appear on the day to which the suit was adjourned for hearing.
- (c) Compare, also, 18 A. 241, which decides that the appearance of a pleader on the date of hearing with a power, not from the defendant but from a third person on behalf of the defendant, was not an appearance of the defendant and, consequently, a judgment that followed was a judgment *ex parte*.

(3) Appearance of party for applying for adjournment:—

Where, on the day of the hearing, the party appears in person but only for the purpose of asking for an adjournment and a judgment follows, the adjournment being refused, the judgment is not an *ex parte* judgment. 23 B. 414.

But, the case will be different if a pleader appears for the defendant to ask for an adjournment and, the adjournment being refused, he retires. In such a case, the judgment will be an *ex parte* judgment, because the functions of the pleader cease when the adjournment is refused. *Ibid* and 8 C.W.N. 621.

(4) Compliance with S. 17 of Act IX of 1887 (Pro. S. C. Courts):—

Where a defendant applied for the setting aside of an *ex parte* decree within time but furnished the security required, under S. 17 of Act IX of 1887, a little later but also within the time mentioned in this article, it was held that the application substantially complied with the requirements of the law laid down in S. 17 of Act IX of 1887. 82 C. 389 = 1 C.L.J. 449.

2.—'Executing any process for enforcing the judgment.'

(1) Execution of any process:—

The words—mean execution of the first process in execution. 8 B.H.C.A.C. 44; 26 W.R. 99; 7 W.R. 375; 4 A.W.N. 322.

(2) Execution of process against a co-defendant:—

The—cannot give a starting point for limitation as against another defendant, the object of the article being that the defendant applying to set aside an *ex parte* decree should be made aware of the execution of the decree against him. Bom. P. J. (1888), 56, cited in Rivas's Limitation at p. 264.

(3) No special notice necessary:—

It is not necessary for the starting of limitation that the defendant-applicant should have a special notice personally regarding execution of process. He must come within thirty days of execution of a process for enforcing judgment whether he has notice or not. 13 W.R. 436.

2.—'Executing any process for enforcing the judgment.'—(Continued).

(4) Case of attachment and sale:—

In cases of attachment and sale in execution, the date of the attachment is the starting point for purposes of this article. 9 C. 869; 7 A. 345 = 5 A.W.N. 79; 9 W.R. 286 = B.L.R. Sup. Vol. 947.

(5) Process for enforcing judgment:—

In the case of a property advertised for sale, the process for enforcing judgment was held not to be executed until 'the proceedings in execution' were brought to a close by sale of the property attached. 7 W.R. 108.

(6) Process for enforcing, meaning of:—

The words—mean actual process by arrest or attachment in execution of the person or property of the debtor. Notice of execution of decree is not sufficient. 2 C. 128.

But see 110 P.L.R. 1905, which decides that a notice under S. 248 of the Civil Procedure Code, if duly served, will be such a process.

(7) Order revoking certificate—service of injunction:—

In the case of an *ex parte* order revoking a certificate granted under Act XL of 1858, the service of an order or injunction directing the grantee of the certificate to deliver the properties of the minor to the new guardian was held to be the starting point. 6 A. 144 = 4 A.W.N. 1.

(8) Proceedings of a Commissioner—Partition suit:—

The appointment of a Commissioner or an Amin to allot properties to parties in a partition-suit is not the issuing of a process in execution nor proceedings of such an officer the execution of any process so as to give a start for limitation under this article. 20 A. 311.

(9) Enforcement of process must be legal:—

The provisions of the article ought to be strictly construed. It must be clearly found that there was a legal and valid enforcement of process. An omission, therefore, to put up a copy of the order of attachment on a conspicuous part of the property was held to be a fatal defect vitiating an attachment and that the date of the attachment could not give a start for limitation under the article. 5 P.R. 1897.

(Old Law).

(1) Executing process:—

The words—meant execution of process against the person or property of the defendant, and not process only against the person. 6 W.R. Mis. 51; 15 W.R. 210; 25 W.R. 72.

(2) Object of provision:—

As to the object of s. 119 of the old Civil Procedure Code (VIII of 1859), see 7 W.R. 375.

158.—Under the Code of Civil Procedure, by a person dispossessed of immoveable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.

(Old Acts).

[Act IX of 1871, art. 158 :—Cols. 2 and 3, same as above. Col. 1.—Under the Code of Civil Procedure, by a person dispossessed of immoveable property and disputing the right of the decree-holder to be put in possession.]

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Case of judgment-debtor :—

- (a) The article includes also the case of a dispossessed judgment-debtor disputing the right of the decree-holder to be put in possession. 21 M. 494 = 8 M.L.J. 75; 1 M.L.J. 42; 6 O.C. 44.
- (b) An application by a judgment-debtor, more than thirty days after dispossession by the auction-purchaser, to set aside the sale, by a summary order, is barred under this article. 7 C. 91 = 9 C.L.R. 53.

1.—‘Dispossessed.’

(1) Effect of symbolical possession :—

- (a) Symbolical possession does not amount to dispossession within the meaning of s. 336 of the Civil Procedure Code. 30 C. 710.
- (b) See 27 M. 262 (at pp. 269 and 270), No. 14 (f) under the heading ‘1. Possession,’ at p. 1057, *supra*.
- (c) The delivery of formal possession will be a sufficient cause of action as against a party to the suit continuing in possession after such delivery and such cause of action can be enforced by a separate suit. 11 C. 98.

(2) Auction-purchaser obtaining symbolical possession—Regular suit :—

Where an auction-purchaser first obtained symbolical possession and, subsequently, a momentary and partial possession only of certain share in a house purchased by him, a suit by him for a declaration of his right and for partition of the house brought more than 12 years after his purchase was barred by limitation. 5 C. 331.

(3) Dispossession—Regular suit for restoration :—

- (a) A person dispossessed under a certificate may bring a regular suit for restoration to possession within 12 years of the dispossession without seeking the aid of the sections relating to execution. 7 W.R. 253 (F.R.); W.R. Gap. Vol. p. 61.

1.—'Dispossessed.'—(Ghose).

(b) A suit by a dispossessed person, whose application under s. 392 of the Code of Civil Procedure, is rejected, may bring a suit for possession more than one year from the date of the order rejecting the petition. 8 M. 82.

(4) Auction-purchaser's suit for possession :—

An auction-purchaser may, within 12 years, sue for possession without resorting to the procedure in the sections relating to execution. 10 M. 53; 14 C. 644.

2.—'Thirty days.'**Commencement of time :—**

The day on which the dispossession took place should be excluded from calculation. 2 B. 678.

166.—To set aside a sale in *Thirty days* ⁽¹⁾. The date of the sale ⁽²⁾. execution of a decree, on the ground of irregularity in publishing or conducting the sale, or on the ground that the decree-holder purchased without the permission of the Court.

(Old Acts).

[Act IX of 1871, art. 159 :—Col. 1. To set aside a sale in execution of a decree on the ground of irregularity in publishing or conducting the sale.

Cols 2 and 3.—Same as those in article 166 of the present Act. Act XIV of 1859 :—No corresponding provision].

(Notes)**Scope of article.****(1) Application on ground other than irregularity and want of permission :—**

The article is inapplicable to an application on grounds (e.g., fraud, &c.) other than irregularity in publishing or conducting sale or omission to obtain permission to bid. 9 B. 468.

(2) Cases under S. 310A, C.P. Code :—

(a) "It has been.....held in Calcutta..... that s. 310A (of the C.P. Code) is retrospective in its operation, in so far as it may affect decree-holders who obtained their decrees before Act V. of 1904 came into operation"——Mitra on Limitation at p. 1094, citing 22 C. 767 (F.B.) & 18 M. 477.

(b) An application for setting aside a sale under s. 310 A (C.P.C.) ought to be made within thirty days from the actual sale. It would not be within time, if presented within thirty days from the date of a first appellate

Scope of article.—(Continued.)

Court's order reversing an order setting aside the sale or of the second appellate Court confirming such order of the lower appellate Court.
29 C. 626=6 C.W.N. 776.

(1) Separate suit, maintainability of—Fraud:—

- (a) A separate suit for setting aside a sale on the ground of fraud in execution-proceedings will be barred under s. 244, Civil Procedure Code; even when the purchaser is a third party (*i.e.*, a stranger to the suit); an application may be made under s. 244. 26 C. 326=3 C.W.N. 399; 2 C.W.N. 691; 6 C.W.N. 283 [following 19 C. 683=19 I. A. 166 (P.C.)]
- (b) But one on the ground that the decree itself was obtained by fraud will lie. 26 C. 326=3 C.W.N. 399.
- (c) A separate suit will not lie to set aside a sale on the ground of the judgment-debtor's being kept in ignorance of the execution-proceedings by the fraud of the decree-holder. 9 B. 468.
- (d) A separate suit will not lie on the ground of fraud, when circumstances affecting the validity of the sale have been brought about by the fraud of one of the parties to the suit and give rise to a question, between the parties, coming within S. 244 of the Civil Procedure Code, apart from the question of fraud. 17 C. 709 (F.B.) approving 11 C. 876; 6 B. 148; 5 M. 217; 9 B. 468 and *dissenting from* 14 C. 679 (in part).

(2) Benamiee purchases—Suit and applications:—

- (a) In case of *benamiee* purchases, s. 244 will not bar a separate suit on that ground. A separate suit will lie to set aside the sale. 17 C. 769 (F.B.)
- (b) An application may be made by the judgment-debtor, under s. 244, for cancellation of the sale on the ground that the decree-holder purchased *benamiee*, in the name of a stranger. Such an application will be governed by art. 178, and not by this article. 5 C.W.N. 265.

(3) Application under S. 244:—

An—on the ground of fraud, for setting aside a sale, is governed by art. 178, and not by this article. 2 C.W.N. 691. *Compare* 5 C.W.N. 265.

(3a) Application after confirmation—Fraud:—

An application may be made, under s. 244, C.P. Code, even after confirmation of sale, for setting it aside on the ground of fraud. 30 C. 142=7 C.W.N. 305.

(3b) Application on ground of fraud:—

The period of limitation for an application by a judgment-debtor to set aside a sale on the ground of fraud will be computed from the time when the fraud first became known to him and it is immaterial that the sale was confirmed. 17 C. 769 (F.B.).

(4) Void Sale:—

A sale held in contravention of s. 290, C.P. Code, (*s.g.*) within the thirty days of the notification of the sale is void. 11 A. 333=9 A.W.N. 115.

Scope of article.—(Concluded.)

(5) Second appeal :—

When a judgment-debtor applies for setting aside a sale against the decree-holder and the purchaser, even where such third party is a stranger, and the application is rejected, an appeal and a second appeal will lie, the order being one under s. 244, Civil Procedure Code. 26 C 539-3 C.W.N. 403.

1.—‘Thirty days.’

(1) Application under s. 311, C.P. Code :—

See cases No. 1 (b and c), under the heading “2.—Make an application,” at p. 616, *supra*.

(2) Late joinder of auction-purchaser :—

The joinder of an auction-purchaser as a party to an application after the period prescribed by this article will be a bar to the maintainability of the application. 11 A.W.N. 121.

(3) Application after time—Fraud :—

An application, under s. 311 of the Civil Procedure Code, to set aside a sale cannot be made after the expiry of the thirty days of such sale and after such sale has been confirmed, even though it be alleged that the sale was fraudulently kept from the knowledge of the applicant until after such confirmation. 14 C. 679.

(4) Application under s. 294, C. P. Code :—

(a) An application to set aside the sale, under S. 294, C. P. C., must be made within thirty days from the date of the sale under this article. 13 M. L. J. 281.

(b) An objection that a purchase by decree-holder was invalid on the ground of omission to obtain permission to bid cannot be made by a separate suit, at any rate when an application based on the same ground would have been barred by this article. 11 B. 586.

2.—‘The date of the sale.’

(1) Application after confirmation of sale :—

An application may be made even after confirmation of sale, if, within the time allowed for putting the objections forward, the sale is confirmed by the precipitate action of the Court. 9 A. 411.

(2) Confirmation of sale—Separate suit :—

A sale ought not to be confirmed within the thirty days mentioned in this article. An objection to sale on the ground that the property sold was not attachable may be put forward by means of a separate suit, and not by means of an application under s. 311. 19 P. R. 1884. See also 61 P. R. 1897.

(3) Confirmation pending application :—

The confirmation of a sale pending an application, under s. 244, C. P. Code, is no bar to the maintenance of the application even when the purchaser is a stranger. 6 C. W. N. 283.

2.—'The date of the sale.'—(Concluded.)

(4) Application on minor's behalf:—

If an—be dismissed on the ground that it was presented by a person not legally authorised, the application may be repeated during the minority of the applicant by another guardian duly authorised, even beyond the period of limitation prescribed by this article. 9 A. 411.

187.—Complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree or of dispossession⁽¹⁾ in the delivery of possession to the decreeholder or the purchaser of such property.

Thirty days.

The date of the resistance, obstruction, or dispossession⁽²⁾.

(Old Acts).

[Act IX of 1871, Art. 160:—Col. 1.—Complaining of resistance or obstruction to delivery of possession of immoveable property sold in execution of a decree, or of dispossession in the delivery of possession to the purchaser of such property.

Cols. 2 and 3.—Same as above.

Act XIV of 1859.—No corresponding provision.]

(Notes)

Scope of article.

(1) Obstruction by judgment-debtor:—

The article is not confined in its operation only to third parties. It is comprehensive enough to include applications by judgment-debtors also. 1 M.L.J. 42.

(2) Application under s. 318, C. P. Code:—

An application, under Civil Procedure Code, s. 318 (and not one under s. 328 complaining of resistance to possession), by the purchaser at a Court-sale praying for delivery of possession of the property purchased, is governed by art. 179 and not by this article. 13 M. 504. *

(3) Suit by auction-purchaser for possession:—

An auction-purchaser may bring a suit for possession if he can show that he attempted to obtain possession in execution-proceedings and that such attempt was unsuccessful. He is not confined solely by way of proceedings in execution. 12 C. 169.

See 14 C. 644, which decides that the auction-purchaser may either bring a suit for possession or may apply therefor in the execution department, the two remedies being concurrent.

Scope of article.—(Concluded.)

(4) Application by minor:—

Where property was purchased in a Court-sale on behalf of a minor and no step was taken on his behalf to remove the obstruction caused to delivery of possession thereof, an application for possession, if not made within 30 days after the minor had attained his majority, will be barred. 11 B. 473.

1.—‘Dispossession.’

(1) Effect of symbolical possession:—

- (a) Symbolical possession does not amount to dispossession as contemplated by s. 335, C. P. Code. 30 C. 710.
- (b) Symbolical possession such as may be given by sticking a bamboo into the ground, in cases in which actual possession might have been obtained, cannot save limitation. *5 C. 831.
- (c) As between the judgment-debtor and the decree-holder or purchaser, if the delivery of the symbolical possession was to the knowledge of the judgment-debtor or his agents or officials and in spite of their objections, it will be as effectual as actual possession and will amount to dispossession of the judgment-debtor. 27 M. 262.
- (d) The possession of a judgment-debtor, who continues in occupation in spite of delivery of symbolical possession to the auction-purchaser is adverse; such adverse possession, if continued for more than 12 years, will bar the auction-purchaser. The possession of the judgment-debtor may be tacked on to that of a purchaser from him. 18 B. 37.

2.—‘The date of the resistance, obstruction, &c.’

(1) Second application by obstructed purchaser:—

The only remedy of an obstructed purchaser, who does not complain within 30 days of the obstruction, is by a regular suit. He cannot maintain a second application for removal of the obstruction. 5 C. 331.

(2) Second application—Separate suit:—

- (a) An obstructed auction-purchaser must complain within 30 days. If, without doing so within the time limited by this article, he puts in a second application for possession under s. 318 of the Civil Procedure Code, his application would be barred; but there is no bar to his bringing a separate suit. *Per Aikman, J (Knox, J, dubitante)*, 26 A. 365 = 1 A.L.J. 86 = A.W.N.* (1904), 46 (following 11 B. 473 and *distinguishing* 13 M. 504 and 18 A. 233).
- (b) The direction, in s. 328, C. P. Code, to complain within the time limited is imperative, imperative in the sense of prohibiting the adoption of procedure provided in s. 328, C.P. Code, beyond the period provided in the section and in this article, if the complainant had allowed the special period to elapse. 7 A. 79 (at p. 31).

(3) Separate suit by obstructed decree-holder:—

- (a) It is not obligatory on an obstructed decree-holder to pursue his remedy only under s. 328, C. P. Code. He may bring a separate suit complaining of the obstruction and seeking possession. 8 B. 602.
- (b) See also 11 B. 160, 168, quoted by Mitra on Limitation, at top of p. 160. But see next case.

2.—'The date of the resistance, obstruction, &c.'—(Concluded.)

(4) Second obstruction, complaint against :—

- (a) Where no complaint having been made against a first obstruction, a second application for possession was made and the applicant was again obstructed, and he complained within time as regards the second obstruction, his application was held to be in time. 5 M. 113.
- (b) Where a certain person obstructed delivery of possession on behalf of another without filing a *Vakalatnamah* and when a second application for possession was made and possession attempted, the same person obstructed again and filed *Vakalatnamah* on behalf of the person, who was instrumental in making the objection, *held* first obstruction ought not to be taken as the starting point of limitation. 11 A.W.N. 131.

168.—For re-admission of an *Thirty days* (2). The date of the dismissal of the appeal dismissed for want of prosecution⁽¹⁾.

(Old Acts).

[Act IX of 1871, Art. 161 :—Same as above.

Act XIV of 1859. —No corresponding provision.]

(Notes)

Scope of article.

(1) Dismissal of appeal—S. 551, C.P. Code :—

This article is inapplicable to an application for re-admission of an appeal set down for hearing under s. 551 of the C. P. Code and dismissed on the date fixed for such hearing owing to the absence of appellant's pleader. 76 P.R. 1882.

(2) Application under Rules of Calcutta High Court :—

An application for re-admission of an appeal dismissed for default in putting in costs of preparation of Paper-book is not an application under s. 558, C.P.C., but one under the Rules of the Calcutta High Court and as such is not governed by this article. 23 C. 339: *compares* 24 C. 350 (F.B.) = 1 C.W.N. 21, which *overrides* 23 C. 339 on another point.

1.—'Dismissed for want of prosecution.'

Dismissal of appeal :—

An appeal cannot be dismissed for default, where a pleader appears for the appellant and prays for an adjournment, and which being refused, says (without retiring from the case) that he is unable to proceed with the appeal. 26 M. 267.

2.—'Thirty days.'

(1) Finality of order :—

The order of dismissal of an appeal for default would become final on the expiry, without an application for a re-admission, of the thirty days provided in this article. If, on an application made after the expiry of the thirty days, the appeal is re-admitted and heard, all proceedings from, and including, the re-admission would be invalid. 44 P.R. 1882.

2.—'Thirty days.'—(Concluded.)

(2) Extension of time—Court's discretion:—

A Court has no power to extend the time allowed by this article for making an application under s. 558, C.P.C., for re-admission of an appeal dismissed for default under s. 556 and cannot consider the propriety of the order of dismissal. 10 A.W.N. 196 and 9 A.W.N. 151.

169.—For a re-hearing of an *Thirty days* ⁽¹⁾. The date of the decree in appeal.
appeal heard *ex parte*
in the absence of the
respondent.

(Old Acts).

[No corresponding provision in either of the two earlier Acts.]

(Notes)

1.—'Thirty days.'

(1) Re-presentation of defective application:—

A defective application presented within thirty days but returned for amendment and re-presented after the expiry of the 30 days held to be presented within time for purposes of this article. 5 C.W.N. 816.

(2) Extension of time—Discretion of Court:—

The Court has no power to extend the time proscribed by this article. 66 P.R. 1882.

170.—For leave to appeal *Thirty days* ⁽¹⁾. The date of the decree
as a pauper. appealed against.

(Old Acts).

[Act IX of 1871, Art. 162:—Cols. 1 and 8, same as above. Col. 2.—Ninety days.
Act XIV of 1859:—No corresponding provision.]

(Notes)

Scope of article.

(1) Application to Judicial Commissioner:—

The limitation for an application to the Judicial Commissioner for leave to appeal, as a pauper, is 30 days, from the date of the judgment appealed against under this article. L.B.R. (1872-92), 149.

(2) Applicability of S. 5 of the Act:—

(a) The provisions of s. 5 are not applicable to applications under this article. 12 A. 79 (F.B.) = 10 A.W.N. 25 and 1 A.W.N. 125.

(b) Delay in the disposal of an application under this article would be a 'sufficient cause' within the meaning of s. 5 of the Act. *Per Candy, J.* in 22 B. 849.

(c) An application for leave to appeal *in forma pauperis* is not included in the term 'appeal' in s. 5 of the Act. 30 C. 790.

Scope of article.—(Concluded.)**(3) Discretion to extend time:—**

The Court has no discretion to extend the time, prescribed by this article. 82 P.R. 1879 (cited in Rivas's Limitation, at p. 266).

(4) Court's discretion to grant time for appeal:—

Where an application for leave to appeal in *forma pauperis* is rejected, the Court may allow the appeal memorandum to be stamped as an ordinary appeal within the time to be fixed and the appeal would be in time even though more than the thirty days mentioned in this article. 22 B. 849.

1.—'Thirty days.'**(1) Application presented after thirty days:—**

Where on a memo of appeal being held insufficiently stamped, an appellant obtained permission to appeal in *forma pauperis*, the appeal was held barred by limitation, the application for leave to appeal in *forma pauperis* having been presented beyond the thirty days allowed by this art. and art. 178 not applying to the case. 19 B. 48.

(2) Delay in obtaining copies:—

(a) For purposes of this article and s. 12 of the Act, the important date is not the date when the copy is delivered but the day on which it is ready for delivery, where the party has notice of the 'ready' date. 12 A. 79 = 10 A.W.N. 25.

(b) Where, in the case of an application for leave to appeal as a pauper, an application for copy is dismissed on the ground of delay in furnishing stamps and another application for restoration of the dismissed application is admitted, the delay in the grant of copies may be counted in favour of the appellant, under s. 12 of the Act. 18 M. 374.

(c) No indulgence as to delay similar to that in the case of appeals and applications for review can be granted in the case of applications under this article. 3 M. 280.

(d) As to the time to be deducted under s. 12 of the Act, see Nos. 2 and 5 (a) at p. 595, *supra*.

171.—Under section 371 of the Code of Civil Procedure, [or under that section and section 582 of the same Code, for an order to set aside an order for abatement (1) or dismissal.] *Sixty days.* The date of the order for abatement or dismissal.

(Old Law).

The above article corresponds to Art. 171 C, introduced by Act XII of 1879, the words within brackets in the present article (*vide* art. 171) having been introduced by Act VII of 1888.

(Old Law).—(Concluded.)

Art. 171C ran as follows:—Under section 371 of the same code, for an order to set aside an order for abatement or dismissal.—Sixty days.—
The date of the order for abatement or dismissal.

(N.B.)—(1) It will be seen that before Act VII of 1888, the article read as if it was applicable only to suits and not to appeals.

(2) There were conflicting decisions, before Act VII of 1888, as to whether the article as it then stood was applicable to appeals.

(3) Such decisions, which have been rendered unnecessary by article 171 as it stands at present, are omitted, to avoid confusion.

(Notes)

Scope of article.

(1) Revival of suit:—

If a sole plaintiff dies and his legal representative does not come in within 60 days, the suit will abate. But this does not prevent the Court from reviving the suit, on the application of the legal representative of the deceased within three years, if the latter explains the cause of the delay. 5 C. 139 = 4 C.L.R. 374.

(2) Applications not falling under s. 372, C. P. Code:—

(a) The article will be inapplicable to an application under s. 372, C.P.C. Such an application will be governed by art. 178. 8 C. 337 (844) = 10 C.L.R. 449; see also 12 C.L.R. 421.

(b) Compare 8 C. 420 and 3 C.W.N. 756, which held that, as regards an application in a pending suit, the right to apply is one that accrues *de die in diem*, and that where the defendant in a partition-suit, in which no final decree is passed, dies, an application by the plaintiff for revival of the suit and for continuation of proceedings against the deceased representatives will not be barred even though it is put in beyond three years from the death of the deceased.

(c) Compare, also, 5 C. 726, where it was held that, where the representatives of a deceased plaintiff, in a suit in which the defendant also was dead, put in a fresh suit as supplemental to the one instituted by the original plaintiff (since deceased), such fresh suit might be treated as an application under s. 372, C.P. Code, which could not be barred by any length of time.

1.—‘To set aside an order for abatement.’

(1) Effect of death after judgment:—

In those cases in which an action would abate upon the death of the plaintiff before judgment, it would not abate if final judgment had been obtained before the death of the plaintiff; in the latter class of cases, the benefit of the judgment would go to legal representatives of the deceased. 9 A. 181 (F.B.)

(2) Decree obtained on supposition that defendant was alive:—

Where the sole defendant to a suit dies before decree, a decree obtained against him on the supposition that he was alive is incapable of being executed. 3 C.L.R. 192.

*1.—‘To set aside an order for abatement.’—(Concluded).***(3) Order abating suit and setting aside abatement:—**

See 9 B. 275, which decided that, notwithstanding s. 365 of the Civil Procedure Code and notwithstanding the Limitation Act, it was competent for a Judge in Chambers to *revive* a suit by making an order for abatement under s. 366 of the Code coupled with an order under s. 371 setting aside the order for abatement. Cf. 9 C.W.N. 369.

172.—By a purchaser at an *Sixty days*. The date of the sale. execution-sale to set aside the sale on the ground that the person whose interest in the property purported to be sold had no saleable interest therein.

(Old Acts).

[No corresponding provision in either of the old Acts.]

(Notes)**Scope of article.**

- (1) A sale confirmed before the sixty days provided for confirmation of sale is not inoperative on that account. 7 M. 512.
- (2) A purchaser at a Court-sale can maintain a suit against the decree-holder for refund of the purchase-money on the ground that the sale passed no interest in the property. 12 C. P. L. R. 49.
- (3) A purchaser at a sale in execution may resist the confirmation of the sale under s. 313, C. P. Code, and he may apply for refund of purchase-money, even after confirmation, on the ground that the Court-sale passed no interest in the property sold. 8 M. 90.

173.—For a review of judgment⁽¹⁾ *Ninety days*. The date of the decree except in the cases or order. provided for by No. 160A and No. 161.

(Old Acts).

[No corresponding provision in either of the old Acts.]

(Notes)**Scope of article.****(1) Review of S. C. Judgment:—**

Where the circumstances of a small cause suit under Act XI of 1865 were such as to admit of a review and not of a new trial, *held*, an application for review was governed by this article. 10 C. 297.

Scope of article.—(*Concluded.*)

(2) Necessity for copy of Decree or Judgment:—

An application for review need not be accompanied by a copy of the decree, order or judgment sought to be reviewed. 17 A. 213.

1.—‘A review of judgment.’

Second application for review:—

A second application for review presented after the period of limitation prescribed by this article will be barred and the time occupied by the first application cannot be deducted in favour of the applicant. 4 Bom. L.R. 121.

173A.—For the issue of a notice *Ninety days*. When the payment under section 258 of the same Code to show cause why the payment or adjustment therein mentioned should not be recorded as certified. or adjustment is made.

(Old Acts).

[Art. 161 of the then existing Act was modified by s. 108 of Act XII of 1879 as follows:—

161.—For the issue of a notice under s. 258 of the same Code to show cause why the payment or adjustment therein mentioned should not be recorded as certified.—Twenty days—When the payment or adjustment is made.

(N.B.) This article (161) was transposed by s. 66 (1) of Act VII of 1888 and became art. 173 A, ‘Twenty days’ in the Act XII of 1879, being modified into ‘Ninety days.’]

(Notes)

Scope of article.

(1) Decree for land:—

A decree for delivery of land not being governed by s. 258 of the Code of Civil Procedure, this article does not apply to applications to record such delivery of land out of Court. 22 M. 183—8 M.L.J. 175.

But see 6 C. 786, which holds that this article and s. 258 of the Code of Civil Procedure relate to the judgment or payment in the case of any kind of decree and not merely to matters of money-decrees.

(2) Decree-holder's report ‘suo motu’:—

This article has no application to cases where the decree-holder takes step to report satisfaction *suo motu*. 8 A.W.N. 115.

Scope of article.—(Concluded.)**(3) Payment in pursuance of an unsanctioned agreement:—**

Where the payment sought to be certified has been made in pursuance of an agreement, which has not been sanctioned by the Court, this article would not apply. 1 M.L.J. 332.

(4) Payment before order absolute:—

The article does not apply to the case of any payment towards a mortgage-decree before an order absolute is passed. 8 C.W.N. 102.

(5) Payment by purchaser of property covered by mortgage-decree:—

This article does not govern an application by a private purchaser of a mortgaged property under a decree setting forth an agreement with the decree-holder out of Court and an adjustment of the decree in pursuance of it. 24 M. 412.

(6) Court's power to enquire into question of payment—Mortgage-decree:—

The Court may go into the question of payment towards a mortgage-decree in an application under s. 87 of the Transfer of Property Act. 16 C.P. L.R. 111.

(7) For what purposes uncertified payments may be proved:—

It is open to the decree-holder to prove even payments not certified to the Court in order to enable it to determine whether his application for execution is within time. 21 B. 123; 21 C. 542 (549); 11 B. 506 (*overruling* 6 B. 146); 17 A. 42; 26 A. 86 (*overruling* 12 A. 569); 4 B.L.R. 130 (F.B.); 11 W.R. 232.

(8) Suit for declaration by Judgment-debtor:—

If, after payment or adjustment of the decree, *though not certified* in Court, the decree-holder seeks to further execute it, the judgment-debtor may bring a suit for a declaration that the decree had been satisfied. 10 C. 354.

But see 11 B. 6 (F.B.) which decides that such a suit would not lie. This case *overrules* 6 B. 146.

174.—By a creditor of an insolvent judgment-debtor or under section 353 of the Code of Civil Procedure. *Ninety days.* The date of the publication of the schedule.

(Old Acts).

[No corresponding provision in either of the old Acts.]

(Notes)**Scope of article.****(1) Creditors of Insolvents before the High Courts (O.S.):—**

This article does not apply to the cases of creditors of insolvent-debtors wishing to prove their debts on the original side of the High Court. 12 C.L.R. 105 (*cited in* *Mitra's Limitation* at p. 1101).

Scope of article.—(Concluded.)

(2) Application under s. 352, C.P. Code:—

This article does not apply to applications under s. 352 of the C.P. Code. 11 M. 1.

(3) Application when schedule not prepared:—

Where no schedule has been framed by the Court but a creditor wishes to prove his debt, this article does not apply. Art. 178 applies to such a case. 6 A. 142.

(4) Applicability of English law:—

The English Rule 230 limiting the time for applications to prove an insolvent's estate does not apply to India. 26 B. 623.

175.—For payment of the *Six months.* The date of the decree. amount of a decree by instalments.

(Old Acts).

[No corresponding provision in either of the Old Acts].

(Notes)

Scope of article.

(1) Order after period of limitation:—

- (a) An order providing that the amount of a decree should be paid by instalments may be made even after six months from its date in case both parties apply to the Court therefor. 15 C. 502. Compare next case.
- (b) The Court's order on a barred application under s. 210, C. P. Code, by the judgment-debtor to pay the decree-amount in instalments would be invalid, notwithstanding the fact of the decree-holder's consent thereto. 14 C. 348.

(N.B.) See 61 P.R. 1896 and 26 P.R. 1894 noted under Art. 170, *infra*.

(2) Order for abatement and revival:—

Where a sole plaintiff died and for more than six months no steps were taken for the revival of the suit, and the defendant applied for the abatement of the suit and the legal representative of the deceased plaintiff applied for revival and the Court was satisfied as to the existence of grounds for the application for revival not being made in time, the Court ordered the abatement of the suit and at once passed an order reviving it. 9 C.W.N. 362.

***175A.—**Under section 365 of *Six months.* The date of the death of the Code of Civil Pro- of the deceased.

* This and articles 175A, 175B and 175C were inserted by Act VII of 1888. Till the passing of Act VII of 1888, there was a diversity of opinion as to whether the articles as they stood then were applicable to an appellant or respondent in an appeal (whether plaintiff or defendant) as distinguished from a suit. Such discussions were set at rest by the enactment of these articles—by Act VII of 1888; the old decisions, which are no longer Law are, therefore, omitted.

cedure by the legal representative of a deceased plaintiff, or, under that section and section 582 of the same Code, by the legal representative of a deceased plaintiff-appellant or defendant-appellant.

plaintiff or of the deceased plaintiff-appellant or defendant-appellant.

(Old Acts).

[Art. 171 as amended by Act XII of 1879 :—Under s. 868 or 835 of the Code of Civil Procedure, by a person claiming to be the legal representative of a deceased plaintiff or appellant.—Sixty days.—The date of the plaintiff's or appellant's death.

(Notes)

Scope of article.

(1) Applicability to execution-proceedings :—

This article does not apply to the case of a deceased decree-holder's representative seeking to continue the proceedings in execution. Applications of that kind are governed by art. 170. 3 A. 759 ; 3 B. 221 ; 5 B. 29.

(2) Applicability to minor representatives :—

(a) The minor representatives of a deceased appellant may, regard being had to s. 7 of the Act, apply through their guardian to be placed on record in the place of the deceased even after the period prescribed by this article, if no final order has been passed on the appeal at the date of the application. 108 P.R. 1881 ; 91 P.R. 1885 (F.B.).

(b) An application by a minor representative of a deceased appellant, though beyond the time specified in this article, will sufficiently prevent the abatement of an appeal, though there were other adult representatives who omitted to apply. 10 B. 220.

(3) Application by some only of the legal representatives :—

Where the legal representatives of a deceased appellant were four in number, but only two of them applied under s. 865, C. P. Code, within time and the other two were made respondents after time, it was held that the application of the former two was sufficient to save the proceedings from abatement. 9 M.L.J. 813 = 23 M. 125.

(4) What the Court ought to do :—

In the case of the death of a plaintiff, it is not the duty of the Court to decide his heir. If the legal representative applies in time, the Court must enter his name on the record. If he does not, the Court may either order the suit to abate or if the defendant applies, to pass an order bringing in the legal representative named by the defendant. 27 B. 162.

175B.—Under section 366 of *Six months.* The date of the death of the deceased plaintiff or of the deceased defendant-appellant or plaintiff-appellant. Under section 366 of the Code of Civil Procedure by a defendant, or under that section and section 582 of the same Code by a plaintiff-respondent or defendant-respondent.

(Old Acts).

[Art. 171 A, as inserted by Act XII of 1879:—Under section 366 of the same Code by the defendant.—Sixty days.—The sixtieth day from the date of plaintiff's death.]

(Notes)

Vide 5 C. 199 = 4 C.L.R. 374 noted under art. 171, *supra*.

See 7 A. 794

7 A. 698 (F.B.)

12 C. 590

} abrogated by the Amendment Act VII of 1888.

175C.—Under section 368 of *Six months.* The date of the death of the deceased defendant or of the deceased plaintiff-respondent or defendant-respondent. Under section 368 of the Code of Civil Procedure to have the legal representative of a deceased defendant made a defendant, or under that section and section 582 of the same Code to have the legal representative of a deceased plaintiff-respondent or defendant-respondent made a plaintiff-respondent or defendant-respondent.

(Old Acts).

[Art. 171 B as inserted by Act XII of 1879:—Under section 368 of the same Code, to have the representative of a deceased defendant made a defendant.—Sixty days.—The date of the defendant's death.]

(Notes)

Scope of article.

(1) Operation of the article :—

(a) Applications under S. 368, C. P. Code, put in after the insertion, by the Amendment Act, VII of 1888, of art. 175C, are governed by this article though the suit or appeal might have been commenced, and the death might have occurred, prior to the Amendment Act. 11 A. 408.

(b) Applications under s. 368, C. P. Code, are governed by the Law of limitation in force at the date when they are put in. 7 M. 195.

(3) Application by appellant :—

An application by an appellant for substitution of a deceased respondent's representatives is governed by this article. 9 A. 118.

(N.B.).—Since 10 A. 264, which overruled 7 A. 734 and 9 A. 118, is no longer law by reason of the new section 175C, the law in these overruled decisions now stands good.

(3) Effect of addition of a wrong person :—

Where a plaintiff applies within the time limited by this article to have a certain person as the legal representative of a deceased defendant and learning, after the expiry of the time limited by this article, that the person first added was a wrong person, applies to have the right person brought on the record in the place of such wrongly added person and his proceeding is *bona fide*, the latter application will not be barred by this article. 7 C.W.N. 529.

(4) Abatement of appeal :—

An appeal would abate, if, pending an appeal, a respondent to whom a certain sum of money is due under the decree of the first Court dies and no application to bring in his representative as a party is made within six months, when the nature of the case is such that the cause of action does not survive against the remaining respondents alone. 31 C. 437 (P.C.) = 8 C.W.N. 442.

(5) Application in pending suit :—

(a) An application in a pending suit under s. 372 of the Code is governed by art. 178, and not by this article. 8 C. 857 = 10 C.L.R. 449.

Compare next case.

(b) An application for bringing in the legal representatives of a deceased defendant in a pending suit for a dissolution of a partnership is governed by this article and s. 368 of the C.P. Code and not by art. 178 of this Act or s. 372, C. P. C. If the application is not made within six months, it will be barred, unless sufficient cause is shown for the delay. 16 B. 27.

(6) Computation of time, when both parties to appeal die :—

If an appellant predeceases the respondent, the period of limitation for an application under Ss. 368 and 582, C. P. C., should be computed from the time when the names of the legal representatives of the deceased appellant are entered on the record. 16 C.P.L.R. 78.

Scope of article.--(Continued.)

(7) Death of one of the defendant respondents:—

Where, during the pendency of, an appeal, one of the defendant-respondents died and no application was made within the period prescribed, for bringing the legal representative of the deceased defendant-respondent on record and the case was one in which the cause of action did not survive against the surviving respondent alone, it was held that the appeal abated and that the case was one not governed by art. 175 but by art. 171 B. (inserted by Act XII of 1879) corresponding to this article (i.e.) 175 C. 76 P.R. 1884.

(8) Barred application to bring in representatives:

An application to bring on record the representatives of a deceased defendant, put in more than one year after death of the deceased defendant held to be governed by art. 175 C. and hence barred. 16 B. 27.

(9) Applicability to claims to sue in forma pauperis:—

This article would not apply to an enquiry into a claim to sue in *forma pauperis*. 7 B. 373.

(N.B.).—The above was a case bearing on article 171 B which corresponded to the present art. 175 C. There is no change in art. 171 B, as far as this point is concerned.

(10) Inapplicability to execution-proceedings:—

The provisions of Ss. 365, 366 or 368 are inapplicable to the case of death of the judgment-creditor or judgment-debtor and so none of the provisions of arts. 175 A, 175 B, or 175 C. would apply to such cases. 6 A. 255 (259): See also, 9 A. 759, 9 B. 241 and 5 B. 29 under art. 175 A, *supra*.

(11) Death of parties in execution-proceedings.—Effect:

If one of the parties to a suit dies during execution-proceedings and no steps are taken to bring the representatives on record before the Court passing the decree, the Court to which it is sent for execution will be incompetent to execute it. 10 C. 196 (206).

(12) Applicability to insolvency proceedings:

This article applies to an applicant for declaration of insolvency as the position of such an applicant is sufficiently analogous to that of a plaintiff in a regular suit. *Per Mahmood, J*, in 7 A. 734.

(13) Court's power under s. 32, C. P. Code, unaffected:

No question of limitation can arise with respect to the Court's power to make an order *suo motu*, adding a party defendant to a suit. 12 C. 642.

(14) Limitation for action under s. 363, C. P. Code:—

There is no..... So, an application by the legal representative of a deceased appellant, there being several appellants, to be placed on the record in the place of the deceased. 6 C.W.N. LX.

(15) Doctrine of *nunc pro tunc*:

(a) A judgment should read as from the date on which it is reserved after the parties are heard. Even if any of the parties are dead after the judgment.

Scope of article.—(Concluded.)

ment is reserved but before it is actually delivered, it will be valid. 21 A. 814; 19 B. 807. *Compare* 26 M. 101. *Compare* also 10 W.R. 455=14 B.L.R. 334, which decided that, if a decree were passed against a person, who had been dead at the date of the institution of the suit, it cannot be executed against the legal representative of such person.

- (b) See 19 C. 518 (518)=19 I. A. at p. 184 (P.C.), where, after their Lordships had reserved judgment in an appeal argued before them, one of the parties died, their Lordships directed a decree to be issued.
- (c) Where after arguments were heard and judgment reserved in an appeal before the High Court, the respondent died but a decree was passed against the respondent without the deceased's representatives being brought on the record, it was held that the decree was a good decree so as to be capable of execution against the representatives of the deceased. 21 B. 314.
- (d) If, however, a party to an appeal was dead at the date of the hearing, but the Court proceeded to hear the case and pass a judgment in ignorance of such death, the decree would be a nullity. If, in such a case, the legal representative of the deceased party applies to be placed on the record and for a re-hearing of the appeal, such application ought to be granted. 26 B. 317.
- (e) A decree passed by a Court against a deceased respondent is of no effect although passed without notice of the death of the respondent. 31 P.R. 1886.
- (f) No appeal lies from a decree which a Court inadvertently passes for or against a party deceased before the decree, for neither the representatives of the dead party nor the opposite party can have any *locus standi* as parties to an appeal. 7 P.R. 1889.

(16) Case of assignment and death:—

S. 368 of the C.P. Code applies to the death and death only of a defendant. If, however, the deceased defendant had before his death, assigned his interest, the assignee's application to be placed on the record in the place of the deceased on the ground of the assignment in addition to the ground of the deceased's demise, the application would fall under s. 372 and it must be granted. 9 B. 151.

(Old Law.)

- (1) The period of limitation for bringing in the legal representative of a deceased defendant-respondent on the record was formerly sixty days under art. 171 B. 42 P.R. 1887 (*following* 139 P.R. 1884 and 133 P.R. 1886).

(N.B).—It is now six months under this article.

- (2) 171 B was only prospective in its operation. 6 B. 26. Cf. 11 B. H.C. 117.

Vide 5 C. 139=4 C.L.R. 374 noted under art. 171, *supra*.

9 A. 118=6 A.W.N. 305

7 A. 293=5 A.W.N. 169

7 A. 784=5 A.W.N. 217

3 M. 1

12 C. 590

8 A.W.N. 111=10 A. 260

8 A.W.N. 114=10 A. 270

8 A.W.N. 112=10 A. 264

Abrogated by the enactment of the amendment introduced by Act VII of 1888.

176.—Under the Code of Civil *Six months.* The date of the award⁽³⁾.
 Procedure, section 516
 or 525, that an award⁽¹⁾
 be filed in Court⁽³⁾.

(Old Acts.)

[No corresponding provision.]

(Notes)

Scope of article.

Award filed by arbitrator:—

The filing in Court of an award by an arbitrator under s. 516, C.P.C., is not an application within the meaning of this schedule. Such an act is not governed by this article. 7 C. 388-9 C.L.R. 209.

1.--'Award.'

Separate papers, severally stating the opinions of several arbitrators in a suit and signed and delivered by them severally in Court is not an award. The award should be a complete document signed by the arbitrators conjointly and in the presence of each other. 12 W.R. 397.

2.--'Filed in Court.'

An award was completed and signed and left with the peon of the Court on the last day fixed by the Court. *Held*, that the award was made within time, although it did not reach the hands of the Court until the next day. 26 A. 105.

3.—‘The date of the award.’

In the case of an award given by arbitrators on an arbitration without the intervention of a Court, the date from which limitation begins to run for the purpose of this article is not the date which the award bears but the date on which it is given to the parties by the arbitrators. 9 C. 575.

177.—For the admission of an *Six months*⁽³⁾. The date of the appeal⁽¹⁾ to Her Majesty decree appealed in Council. against⁽²⁾.

(Old Acts).

[No corresponding provision.]

(Notes)

Scope of article.

Applicability of article to minors:—

The words 'for the admission' mean 'to declare an appeal admitted.' The application, therefore, is not one in the nature of an appeal; to such

Scope of article.—(Concluded.)

a case the provisions of s. 7 do not apply. A minor, therefore, applying under this article is not entitled to the protection afforded by s. 7. 18 M. 484.

Applicability of s. 5 of this Act:—

The second paragraph of s. 5 of the Limitation Act relates only to appeals and applications for review of judgment and does not relate to applications under this article. 15 A. 14 = 12 A.W.N. 152.

Discretion to extend time—C. P. C., s. 602:—

It is within the discretion of Courts to extend the term of six months allowed by s. 602, C.P.C., for giving the security and making the deposit required in the matter of an application for leave to appeal to Her Majesty's Council. 6 A. 250.

1.—‘For admission of an appeal.’**(1) Readmission of dismissed petition:—**

A petition put in in time and admitted but struck off for default may be readmitted after six months. B.L.R. Sup. Vol. 730 (F.B.), cited in Mitra's Limitation, p. 1107.

(2) Special leave to appeal:—

Where an appeal has come before the Privy Council without authority and when, no objection being taken at the earliest opportunity, it is raised when the case is called on for hearing, it is competent to the Privy Council to grant special leave to appeal *nunc pro tunc*. 15 B.L.R. 221 (P.C.)

2.—‘Six months.’**Time occupied in getting copies:—**

- (1) An application under this article is not an appeal and the time spent for getting a copy of the decree sought to be appealed against cannot be excluded in favour of the applicant. 10 B. 301; 10 M. 373; 15 M. 169.
- (2) In calculating the period prescribed by this article, the time spent in procuring a copy of judgment appealed against cannot be excluded in favour of the party seeking the admission of the appeal. 1 A. 644.

3.—‘The date of the decree appealed against.’

The date of the original judgment, and not the date on which it has been amended, is the date which the decree ought to bear and the period prescribed by this article must therefore be computed from such date. 2 O.C. 236.

178.—Applications for which *Three years.* **When the right to apply**
no period of limita-
tion is provided else-
where in this schedule,

or by the Code of Civil Procedure, section 230.

(Old Acts).

[No corresponding provision.]

(Notes)

Scope of article.

General.

- (1) The true criterion in determining whether art. 179 or this article applies to a particular application is to ascertain whether any one of the six points of time specified in col. 3 of art. 179 is applicable to it and if none of them is applicable, it is only then that this article will apply. 26 M. 780.
- (2) An application in a partition suit, subsequent to the preliminary decree, for the appointment of a Commissioner, &c. 24 C. 725 (F.B.) Compare 29 C. 758 (overruling 23 C. 279).
- (3) If a partition suit is compromised and a decree made thereon and if the appointment of a Commissioner is necessary to give effect to the partition settled by the parties, an application for the appointment of a Commissioner will be governed by this article and will not be barred because it would be the duty of the Court to appoint a Commissioner to give effect to the order on the compromise and pass a final decree. If the order passed on the compromise is itself the final decree, then the application will be governed by art. 179. 28 M. 127.
- (4) The High Court can deal with a case under s. 622, C.P.C., without being moved by any of the parties. An application, therefore, under the section to the High Court will not be governed by any rule of limitation. 28 C. 680.

A.—Cases falling under the article.

1. Application connected with execution-proceedings:

- (a) An application under s. 244, C. P. Code. 22 A. 376 (A.W.N. (1889), 219 and 22 C. 483); 11 B. 588.
- (b) Where the decree-holder is entitled, under a decree, to execute it only in the event of a default in payment of an annuity, his application for execution will fall under this article and time would run against him only from the date of default. 16 A. 237=14 A.W.N. 61; compare 5 A. 596=8 A.W.N. 143.
- (c) So, also, where a decree expressly provided that execution ought not to be taken out until the expiry of a period fixed in the decree. 8 A. 50=5 A.W.N. 327.
- (d) An application to execute a decree originally incapable of execution but since amended by the High Court is governed by this article and time runs only from the date of the amendment. 17 A. 89=14 A.W.N. 191.
- (e) Where an execution is stayed by a Court by reason of an attachment of the decree sought to be executed, an application for execution after the removal of the attachment will fall under this article and will not be barred if put in within three years from the removal of the attachment. 21 A.W.N. 117.

Scope of article.—(Continued.)

A.—Cases falling under the article.—(Continued.)

- (f) An application for execution by a decree-holder after removal of an injunction by which the proceedings had been stayed. 5 A. 459=3 A.W.N. 89; 6 A. 23=3 A.W.N. 181; 26 A. 156=23 A.W.N. 221. 2 A.W.N. 79, *contra*.
- (g) Where an obstruction to the execution of a decree involves litigation and such obstruction being finally removed by a decision in the decree-holder's favour, whether in execution or in a separate suit, the decree-holder applies again for execution, his application will be governed by this article and be treated as a continuation of proceedings. 28 M. 50 (F.B.) *overruling* 10 M. 23.
- (N.B.)—See, further, cases under the heading “Continuation of Proceedings” under art. 179.
- (h) Where, in the case of a decree for sale of hypothecated property, an order under s. 243, C. P. Code, staying execution is passed in another suit before the date fixed for sale and the decree-holder in the earlier suit afterwards applies for sale, this last application will be governed by this article. 26 M. 780 (17 A. 89; 16 A. 237; 8 A. 56; 24 A. 542; 30 C. 407).
- (i) An application for renewal of an application for execution more than three years having been occupied by proceedings between an intervenor and the decree-holder was held barred under this article. 19 A. 71=16 A.W.N. 188.
- (j) An application for execution after removal of an injunction or obstacle under which the execution had been stayed is in the nature of a revival of execution-proceedings and governed by this article and not by art. 179. 5 B. 29; 1 A. 355; 6 A. 23=3 A.W.N. 181.
- (k) Where a Court directs the execution-petition to be struck off with liberty to the applicant to apply again after the receipt of records from the appellate Court, a second application by the decree-holder, after the receipt of records, will fall under this article. 5 A. 243=3 A.W.N. 8.
- (l) Where a decree directed the payment of the amount decreed in instalments and provided for realisation of the whole amount in case of any one default, an application for recovery of the whole amount, default having occurred, was held governed by this article and not by art. 179. 5 A. 596=3 A.W.N. 143. *Cf.* 5 A. 243=3 A.W.N. 8 and 5 B. 29.
- (m) An application for execution of a decree payable by instalments and providing that, in default of any instalment, the whole of the decree amount shall become due at once, will be barred by this article, if there was a default and if the decree-holder fails to apply within three years of the first default, unless there had been a waiver and receipt of the overdue instalment. 15 C. 502. *Cf.* B.L.R. Sup. Vol. 618; 7 W.R. 21; 2 B. 336; 2 A. 443; 5 C. 97; 7 C. 56; 9 C. 357; 14 C. 352; 13 C.L.R. 243.
- (n) An application for a certificate of sale made after the lapse of a period of over three years after the confirmation of the sale is barred by this article. 5 B. 206. (10 C.L.R. 441; 8 C. 367; 6 B. 139; 7 B. 254; 12 B. 589).
- (*Contra*) 4 M. 172; 6 B. 586; 8 B. 377; 8 A. 519.
- (o) An application for refund of money collected in excess in execution of a decree since amended is one falling under this article, time beginning to run from the date of the amendment of the decree. A.W.N. (1905), 63=2 A.L.J. 169.

Scope of article.—(Continued.)**A.—Cases falling under the article.—(Continued.)**

- (p) An application for refund of money realised under an *ex parte* decree subsequently set aside. 28 C. 118.
- (q) An application by the judgment-debtor for refund of money alleged to have been realised from him in excess. 7 A. 871=5 A.W.N. 61.
- (r) An application for refund of money levied under decree since reversed on appeal. 10 M. 66; 28 C. 109; 8 A. 545=6 A.W.N. 178.
- (s) An application by an auction-purchaser for refund of purchase-money, on the sale being set aside under s. 811, C. P. Code. 11 A. 873=9 A.W.N. 112.
- (t) An application for ascertainment and assessment of mesne profits. 14 C. 50. But see 19 C. 182 (F.B.) and 25 C. 208.
- (u) **Ascertainment of mesne profits :—**

Where a decree directed mesne profits to be given to plaintiff from a date to be fixed in execution, the plaintiff could not be given more than three years' mesne profits from date of decree, even though possession was not delivered during that period. 24 B. 945.

(v) Decree-holder not keeping decree alive :—

When a decree-holder attaches property and does nothing thereafter for three years and more either to enforce the decree or to keep it in force, an application for sale of the attached property would be barred by this article, even though the attachment is not withdrawn. 7 C.L.R. 424.

(w) Application for execution of amended decree :—

An application for execution of an amended decree put in within three years from the date of the amendment was held to be in time, notwithstanding the fact that the amendment was made nearly 12 years after the original decree, which was incapable of execution, the rule of limitation being that prescribed by this article. 17 A. 20.

(x) Application under s. 318, C. P. Code :—

An application by a purchaser for possession under s. 318 of the C. P. Code ought to be computed from the date of the issue of the certificate to the purchaser not from the date of confirmation. If put in after the expiry of three years from the issue of the certificate, it would be barred. 8 B. 257; 17 B. 228, and 3 B. 438.

(y) An application for a certificate of sale. 5 B. 202.

(But this decision is not law now. See notes under heading B. under 6 B. 586.

(z) Application for re-sale :—

Where mortgaged property being sold at Court-auction, it was purchased by the judgment-debtor in the name of a stranger and the High Court, finally, in a second appeal by the decree-holder, confirmed the sale with a remark that the mortgaged property might be re-sold, an application by the decree-holder for the re-sale was held governed by this article and not barred because the application for re-sale was held to

Scope of article.—(Continued.)

A. Cases falling under the article.—(Continued).

be a continuation of an application by the decree-holder for setting aside the sale and re-sale of the property and the present application was within three years of the High Court's order suggesting re-sale. 28 C. 397.

(aa) Application to set aside a sale for fraud. 26 C. 324; 2 C.W.N. 691; 3 C.W.N. 333. The latter two cases also decide that art. 166 would not apply to such an application.

But see 26 C. 326 (Note), which decides that such an application is governed by art. 95, *supra*.

(bb) Application to set aside sale—Act VIII of 1885 (B.C.), s. 173.

An application to set aside a sale under the Bengal Tenancy Act, s. 173 by a person interested in the sale. 24 C. 707 = 1 C.W.N. 534.

(2) Application in suits:—

(a) An application under s. 372, C. P. C. 8 C. 337 = 10 C.L.R. 449; 12 C.L.R. 421.

(b) An application by the legal representative of a deceased plaintiff for the revival of a suit which had abated in consequence of the death of the original plaintiff. 5 C. 189 = 4 C.L.R. 374.

(c) An application by an appellant to have the representative of a deceased respondent made party to the appeal. 9 M. 1.

(d) An application to rescind leave granted to sue. 13 B. 404.

(e) An application to amend decree, under s. 206, C.P.C. 4 A. 23 = 1 A.W.N. 114.

But see 10 M. 51, No. (g), under the heading B. also 11 B. 284.

(3) Application in Insolvency matters:—

(a) An application by an unscheduled creditor in insolvency proceedings for execution of his decree after the discharge of the Receiver. 30 C. 407.

(b) An application by a creditor, in the case of a judgment-debtor's being declared an insolvent, to prove his claim is governed by this article and would be barred if put in more than three years from the date of declaration of insolvency. 6 A. 142 = 3 A.W.N. 264.

(c) Where a registered creditor of an insolvent applied for realisation of the balance of his decree-debt, the debtor having agreed to pay the amount in instalments, and no amount having been paid for more than three years before the application of the creditor, *held* the latter's application was barred by this article. 52 P.R. 1682.

(4) Application under the Transfer of Property Act:—

(a) The time from which the period for an application under s. 87 of the Act is to be computed is the date fixed by the decree for payment of the mortgage money. 24 A. 542 = 22 A.W.N. 160.

(b) An application for an order absolute for sale under s. 89 of the Transfer of Property Act is not an application for execution. It would, therefore, fall under this article for purposes of limitation. 21 C. 818; compare 26 C. 133.

Scope of article.—(Continued.)

A.—Cases falling under the article.—(Concluded.)

- (c) Applications for a decree under s. 90 of the Transfer of Property Act. 21 A. 453=19 A.W.N. 166.
 - (d) Where a decree is amended on the application of the judgment-debtor and the decree-holder applies within three years from the date of the amendment, for a decree under s. 90 of the Transfer of Property Act, the application will fall under this article, time beginning to run from the date of the amendment. 22 A.W.N. 50.
 - (e) An application to obtain a decree under s. 90 would be barred if put in after three years from date of confirmation of the sale of the mortgaged property. 21 A. 453.
- (5) Application by Government C.P.C., s. 411:—
An application by Government under s. 411, C.P. Code, for recovery of Court-fees. 4 M. 155.

B.—Cases not falling under the article.

(1) Applications under the Civil Procedure Code:—

- (a) An application for a certificate of sale by a purchaser in Court-auction, because the Court has no discretion to refuse a certificate of sale to a purchaser. 4 M. 172; 6 B. 586; 8 B. 377; 3 A.W.N. 262.
5 B. 202 which held that this article barred an application for a certificate of sale put in more than three years from the confirmation of the sale was *dissented from* in 6 B. 586.
 - (b) An application for summons after the expiry of the period of limitation for the suit is not barred by this article. 5 C. 120.
 - (c) An application to a Court to revive a suit and restore it to the Board or to transfer a case from one board to another or transfer a case to the bottom and any similar application with reference to its own cause-list. 6 C. 60=6 C.L.R. 345.
 - (d) An application in a pending suit to have the heirs of a deceased defendant substituted on the record is not governed by this article. The right is one that accrues *de die in diem*. 30 C. 609. Compare 5 C. 726.
 - (e) Applications in pending suits in which no final order or decree has been passed. 8 C. 420; 3 C.W.N. 756.
 - (f) But the mere filing of a plaint or the fact that a plaint is on the file will not prevent the application of this article, where the plaintiff is guilty of laches and where he takes no steps whatever to get the defendant served for a considerable length of time and where he cannot explain the cause of his delay. 3 C. 812.
 - (g) Application under s. 206, C.P. Code. 10 M. 51; 11 B. 284; 9 A. 364=7 A.W.N. 79; 21 C. 259; 8 A. 519=6 A.W.N. 182.
- (N.B.)—(1) In these cases it was held that this article is inapplicable to applications for reliefs which the Court has no discretion to refuse.
(2) Cf. 4 A. 28=A.W.N. 114 noted under heading A., *supra*.
- (h) Adjudication in Court that the execution of a decree is barred by limitation is final and any subsequent amendment of the decree cannot be said to afford fresh limitation as from the date of the amendment, this article not being applicable. 8 A. 492 [referring to 8 C. 51=11 C.L.R. 113=8 I.A. 123; 6 A. 260=11 I.A. 37 (P.C.)].

Scope of article.—(Continued):**B.—Cases not falling under the article.—(Continued).****(i) Application for execution—Pendency of suit:—**

Where, in consequence of an order setting aside an attachment, the decree-holder had to bring a suit for a declaration of his right to attach and succeeded in the suit and then applied for execution by attachment and sale of the property released from attachment, the latter application was held not to be a revival of the previous execution-proceedings and that this article was inapplicable thereto. 10 M. 22.

(j) An application to set aside an execution-sale on the ground of fraud. 26 C. 326 (Note).

But see 26 C. 324, which decides that such an application is governed by this article.

(k) Application for ascertainment and assessment of mesne profits. 19 C. 132 (F.B.); 25 C. 203.

But see 14 C. 50 under heading A, *supra*.

(l) After an award has been ordered to be filed, it is the duty of the Court to pass judgment thereon even without any application for the purpose. Therefore, such an application, when one is put in, does not fall under this article or any other article of the Limitation Act. 7 B. 316.

(m) The act of taking out a summons calling upon another party to attend a Judge in Chambers on the hearing of an application for taxing the bill of costs is the act of the applicant and not of the Court. It will be governed by the law of limitation contained in this article. 20 C. 399.

(n) Where a defeated claimant obtains a decree in his favour in a regular suit, but this decree is reversed on appeal and execution is not stayed in the meantime and the decree-holder applies for execution more than three years after the decision in the appeal in the claimant's suit, his application will be barred whether this article or art. 179 applies. 22 A.W.N. 154.

(o) Where the Court, of its own motion, makes an order adding a party to a suit, no question of limitation can arise. 12 C. 642; 24 C. 640; 27 C. 540.

(2) Applications under the Criminal Procedure Code:—

Application for sanction to prosecute under s. 195, Cr. Pro. Code. 10 A. 350 = 8 A.W.N. 92.

(3) Applications under the Transfer of Property Act:—

(a) Application for order absolute for sale of mortgaged property under s. 89 of the Transfer of Property Act, the reason being that the article applies only to applications under the C.P. Code. 16 A. 23 = 18 A.W.N. 198; 20 A. 302 = 8 A.W.N. 40; 22 C. 924.

(b) This article applies only to applications under the Code of Civil Procedure. So an application for an order absolute for foreclosure is not governed by this article. 5 C.P.L.R. 61.

(4) Applications under Special and Local Acts:—

(a) An application for a certificate for collection of debts under Act XXVII of 1860 own (Act VII of 1869). 8 M. 207.

Scope of article.—(Concluded.)

B.—Cases not falling under the article.—(Concluded.)

- (b) An application for Probate. 6 C. 707=8 C.L.R. 52; 17 M. 379.
- (c) An application for Letters of Administration. 7 B. 213; 19 C. 48.
- (d) The despatch by the Collector of the certificate contemplated by s. 10 of the Bombay Wards Act III of 1874 is not an application and is not governed by this article. 17 B. 362.
- (e) Application made by a Collector under Bom. Act V of 1862 to have certain rules set aside. 7 B. 546.

- 179.**—For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, section 230.
- Three years; or, where a certified copy of the decree or order has been registered, six years.*
1. The date of the decree or order,⁽¹⁾ or
 2. (where there has been an appeal^(a)) the date of the final decree or order^(c) of the appellate Court,^(b) or
 3. (where there has been a review of judgment) the date of the decision passed on the review, or
 4. (where the application next hereinafter mentioned has been made) the date of applying in accordance with law^(a) to the proper Court^(b) for execution, or to take some step in aid of execution^(c) of the decree or order, or
 5. (where the notice next hereinafter mentioned has been issued) the date of issuing a notice^(a) under the Code of Civil Procedure, section 248, or
 6. (where the application is to enforce any payment which the decree or order directs to be made at a "certain date") such date."
- Explanation 1.*—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of

the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number shall take effect in favour only of such of the said persons or their representatives as it may be made by. But, when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally, against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them or against his or their representatives, shall take effect against them all.

Explanation II.—"Proper Court" means the Court whose duty it is (whether under section 226 or 227 of the Code of Civil Procedure or otherwise) to execute the decree or order.

(Old Acts).

[Act IX of 1871, Art. 167 :—Col. 1 :—For the execution of a decree or order of any Civil Court not provided for by No. 169.

Col. 2 :—Three years.

Col. 3 :—The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review, or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the decree or order, or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, section 216, or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.

Act XIV of 1859, s. 20: No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.

(Notes)

General.

(1) Applications for execution by what law governed :

- (a) All applications for execution of a decree are applications in the suit which resulted in that decree, and are governed by the law of limitation in force at date of suit. 9 C. 446=12 C.L.R. 431; 8 C. 51 (P.C.)=11 C.L.R. 113=8 I.A. 123. Compare the next case.
- (b) The law of limitation applicable to an application for execution of a decree is not the law in force at the date of the institution of the suit resulting in the decree under execution but the one in force at the date of the application for execution. 7 B. 459.

(2) Barred application :—

Where the time for execution of a decree expired when the Court was closed and the petition for execution presented on the re-opening day was returned for amendment within a time fixed but re-presented after such period, the application was held to be time barred. 26 M. 101.

(3) Operation of Act as regards execution :—

This Act operates from the date on which it came into force as regards all applications for execution made under it. 11 C. 55 (*dissenting from* 9 C. 446.)

(4) Right of representatives to be placed on record :—

The representatives of a deceased judgment-creditor may seek to be put upon the record at any time, the rules applicable to representatives of a deceased plaintiff or defendant in a pending suit not being applicable to execution-proceedings. 3 B. 221.

(General.—(Continued).)

(5) Applicability of Ss. 373 and 374, C. P. Code to execution :—

(a) S. 373, C.P.C., read with s. 347 does not apply to proceedings in execution.
37 P.R. 1892 (*dissenting from* 12 A. 392).

(b) S. 374 of the C.P. Code applied to applications for execution. 6 B. 681 ;
7 A. 359 ; 10 A. 71.

(c) But see 10 B. 62, which *dissented from* 6 B. 681 and *held* that applications
for execution are not governed by s. 374, C.P. Code.

(N.B.).—The law has now changed (*vide* Explanation to s. 347, C.P. Code.)

(6) Application by Government :—

Applications for execution by Government are governed, as to limitation, by
the same rules as private individuals. 22 W.R. 512.

(N.B.).—See, further, Nos. 1 to 3 under the heading, "1.—Any suit," at p.
1136, *supra*.

(7) Effect of dismissal for default :—

Dismissal of an application for execution for default does not bar a fresh
application. 18 M. 131.

(8) Effect of private arrangement on limitation :—

No private arrangement made by the parties to a decree, though it has been
recognised by the Court and has substantially altered the decretal
portion, can enlarge the period of limitation allowed by law for the
execution of the decree. 1 A.W.N. 118.

(9) Application by some of several joint decree-holders :—

Where there are several joint decree-holders, some of them alone cannot apply
for execution in respect of their shares alone. 18 M. 464.

(10) Effect of 'striking off' execution-proceedings :—

(a) An execution-application struck off by the Court in consequence of an order
staying execution must be considered to be pending because the Court
has no power to strike off the application. 3 M.L.J. 298.

(b) The fact that an execution-application is struck off for non-payment of
batta cannot bar the entertainment of a fresh application. 1 M.L.J.
750.

(11) Executing Court's power to decide question of limitation :—

(a) Where a Court, before transmitting a decree to another Court makes an
order for its execution, the latter Court cannot enter into the question
whether execution is barred by time. 15 B. 28.

But see next case.

(b) Where a decree has been transferred for execution from one Court to
another, the latter Court has jurisdiction to decide whether the exe-
cution of the decree has become barred. 23 C. 39 (21 W.R. 830 ; 13
B.L.R.Ap. 30 and 16 A. 390 *dissented from*), 10 W.R. 19 (F.B.) ; 11
C.L.R. 348.

General. (Concluded.)

(12) Extinguishment of right:—

A decree-holder, who omits to enforce his decree within the period fixed by law for its execution, loses his remedy and his right in the property may thus become extinguished; 98 P.R. 1879 (cited in Rivaz on Limitation, p. 288), except in the case of a conditional decree (*e.g.*) a decree for redemption. 86 P.R. 1877 (cited in Rivaz on Limitation, p. 289).

(13) Mortgage-debt when decree for money barred:—

Although a mortgagor obtained a decree for money on his mortgage and allowed the same to be barred, this would not prevent him from suing again for possession of the mortgaged property, because the mortgage-debt is not extinguished though the decree for money might be barred. 8 P.R. 1887.

(14) Effect of non-payment within time on redemption:—

A mortgagor-decree-holder, directed to pay the decree-amount and to redeem within a certain time fixed by the decree, cannot, when he has not paid the amount within the time fixed, afterwards execute his decree. 13 M. 267.

(15) Execution barred—Second suit for redemption:—

(a) Where, in the case of a decree for redemption, the execution of the decree is barred by limitation, a second suit for redemption will lie. 7 M. 423; 15 M. 366; 86 P.R. 1877; 14 P.R. 1881.

(b) Even if the original mortgagor-decree-holder's right to execute the decree is barred, a purchaser of the equity of redemption may bring a suit for redemption. 8 M. 478.

(c) But see 25 M. 300 (F.B.), which holds that a second suit will be barred when the decree in the first suit is not executed.

(d) If, in the case of a decree for redemption, the decree-amount is not paid within the time fixed in the decree and redemption secured, a second suit for redemption will be unsustainable notwithstanding the fact that the redemption-decree does not contain a clause for foreclosure. 7 B. 467.

(16) Burden of Proof:—

The burden of proving that his application for execution is unbarred rests on the decree-holder. 6 W.R. Min. 20; 17.

(17) Decree for possession—Second suit:—

The holder of a decree for possession of land, who does not obtain possession by process of execution but allows the decree to be barred loses his right to possession and cannot bring a second suit for possession. 16 P.R. 1893.

Scope of article.

(1) Application for restitution (s. 583, C. P. Code):

(a) Applications made under s. 583 of the C.P. Code for restitution, under a decree, are proceedings in execution governed, as to limitation, by this article. 20 M. 448; 8 A. 545.

Scope of article. (Continued.)

(b) But see 10 M. 66 (in which there is an *obiter dictum* that such an application is governed by Art. 178. The *obiter dictum* was referred to but not followed in 20 M. 448).

(c) Compare 28 C. 113, which decided that an application for refund of the amount levied in execution of an *ex parte* decree, since set aside, is governed by art. 178 and should be made within three years from the date of the setting aside of the *ex parte* decree.

(1a) Application to extend time:

An—granted by the decree to the decree-holder for payment of the decree amount is one to execute the decree and is governed by this article. 28 M. 211.

(2) Applications under the Transfer of Property Act:—

(a) An application under s. 89 of the Transfer of Property Act is, in effect, an application for execution and is governed by this article. 25 M. 244 (F.B.) 28 B. 644; 20 A. 302 (overruling 16 A. 23), 20 A. 357 = 18 A.W.N. 713; 2 A.L.J. 371 = A.W.N. (1905), 196.

(b) So, also, an application under s. 87 of the Transfer of Property Act (i.e.) for an order absolute for foreclosure. 20 A. 357.

(c) In the case of a decree for sale time begins to run from the date of the order absolute for sale and not from the date of the decree. 19 A. 520; see also 18 A. 378 and A.W.N. (1896), 100.

(d) After an order directing the sale, of mortgaged property, no application will lie as under s. 89 of the Transfer of Property Act. So, any such application, if put in, must be regarded as one for execution governed by this article. 24 M. 695.

(3) Decree for pre-emption -Application for execution: -

(a) In the case of a decree for pre-emption, the first application for execution is governed not by this article but by art. 178, since there can be no decree capable of execution until the pre-emptive price is paid. 24 A. 300 = 22 A.W.N. 60 (refg. to 17 A. 39).

(b) The article applies only to decrees capable of execution. Where a decree for pre-emption becomes incapable of execution owing to the default of the decree-holder to pay into Court the amount of the pre-emptive price within the time mentioned in the decree, an application for execution will be unsustainable, notwithstanding the fact that the decree omitted to specify the consequences of non-payment within the time limited. 47 P.R. 1898.

(4) Application for delivery:—

An application, under s. 318 of the C.P. Code, by the purchaser at a Court-sale being one for delivery of possession in execution of a decree falls under this article. 18 M. 504.

(5) Application for refund:—

Application for refund of money collected in excess in execution of a decree since amended is one falling under art. 178 and not under this article. A.W.N. (1905), 63 = 2 A.L.J. 169. Compare 28 C. 113 under No. 1 (c), *supra*.

Scope of article.—(Continued.)

(6) Application NOT in execution of decree :—

- (a) Where a party has obtained a preliminary decree for partition and then makes an application for effecting the partition by metes and bounds, the application is not governed by this article because it is one not in execution of the decree but one in the suit itself towards the drawing up of the final decree. 22 C. 425.
- (b) Where a sum of money is paid into Court by an applicant to set aside an *ex parte* decree, in order that the same might be paid to plaintiff, in the event of the former's failure to get the *ex parte* decree set aside, the amount becomes payable to plaintiff, the moment the application is unsuccessful for any cause. An application, therefore, for drawing the money from Court by the decree-holder is not one for execution (no execution being necessary in such a case) and will not be governed by this article. 8 P.R. 1898.

(7) Rule of *Res Judicata* :—

- (a) The rule of *res judicata* applies to proceedings in execution and so where a proper Court finally decides that an application is barred by time, subsequent applications will be barred by *res judicata*. 8 I.A. 123 = 8 C. 51 (P.C.) = 11 C.L.R. 118; 6 B. 54; 11 B. 537; 9 C. 65. See, also, 20 C. 551, 23 C. 374.
- (b) Where a competent Court passes an order for execution after notice to the judgment-debtor and there is no appeal against such an order, it is not open to the latter, in connection with a later application for execution, to contend that it is barred on the ground that the previous application had been barred at its date. 24 M. 669 [following 8 I.A. 123 = 8 C. 51 (P.C.)]
- (c) Where, in execution-proceedings, a Court makes an order between the parties construing the decree in a particular manner, a contrary construction ought not to be placed on the decree by the same or any other Court. 7 A. 102 (P.C.) = 11 I. A. 181; 7 A. 373.
- (d) The law of *res judicata* is not applicable to proceedings in execution. 3 A. 141 (F.B.)
- (e) Although, at a previous stage of execution-proceedings, the judgment-debtor put forward only certain objections on the merits and the Court passed a decision on the objections so raised, this fact could not preclude him from raising an objection as to limitation at a later stage of the same proceedings. 143 P.R. 1883.
- (f) When, in execution of a decree, the property attached is released under s. 206 (e) on the objection of the judgment-debtor, the same property cannot be attached by the judgment-creditor at a later stage, the previous order being final and conclusive between the parties. 4 P.R. 1886.
- (g) If a Judge finds an application for execution to be within time and there is no appeal against such finding, his successor cannot go behind his order. 15 W.R. 67.

(8) Agreement sanctioned by Court (s. 257A, C. P. Code) :—

The mere sanction, under s. 257A of the C. P. Code, by the Court of an agreement to give time for the satisfaction of a judgment-debt does not alter the decree within the meaning of s. 210 of the C. P. Code.

Scope of article.--(Continued.)

Applications, in such cases, for execution or to take some step in aid of execution are governed by this art. and not by article 178. 26 P.R. 1894 (following 12 A. 571 and 31 P.R. 1896).

(9) Decree postponing execution :--

- (a) Where a decree, by its very terms, directs that execution shall not take place before the expiry of three years from its date, execution shall not be barred because application was not made therefor within three years from the date of the decree. 65 P.R. 1897 (F.B.) overruling 126 P.R. 1892.
- (b) The specification of a term in a decree for the performance of something by the decree-holder and for execution of the decree is not a condition precedent. It has merely the effect of postponing the operation of the decree till that time. 12 B. 33.
- (c) A decree for possession subject to payment by the plaintiff of the value of certain improvements becomes final and capable of execution only on the Court's order determining such value and an application for execution within three years from such order is therefore in time. 8 M. 187 (4 C. 629, approved).

(N.B.)--See, further, cases noted under cl. 6, *infra*.

(10) Decree granting several reliefs : -

When different kinds of relief are granted under a decree, separate applications will lie for the several reliefs. 7 N.W.P. 95.

(11) Partial execution : -

The purchaser of a share in a decree cannot be allowed to take out partial execution but the Court may allow him to execute the decree as a whole, giving security for the protection of the interests of the other shareholders. 23 W.R. 282. Compare 11 W.R. 488.

(12) Restoration to file of a dismissed application :--

B. 647 of the C. P. Code being inapplicable to execution-proceedings, none of the provisions in Ch. VII of that Code apply and so an application for execution dismissed for default cannot be restored to file as under s. 109. 18 B. 499. See 15 A. 84 and 4 I. A. 127.

(13) Decrees transferred for execution :--

The period of limitation applicable to an application for execution of a decree transmitted by one Court to another for execution depends upon the character of the Court which passed the decree and not on that of the Court executing it; (e.g.) the law applicable to the decree of a Small Cause Court transmitted to a High Court for execution is this article and not art. 180. 17 C. 491.

(14) Order for costs by High Court :--

- (a) An order for costs made by the High Court on appeal is governed by this article and not by art. 180. 21 W.R. 391.

(b) So, also, an order of a High Court for costs when rejecting an application for leave to appeal to Privy Council and not by art. 180. 6 C. 201=7 C.L.R. 79.

Scope of article.—(Continued.)

(15) Effect of s. 230, C. P. Code on Limitation :—

(a) The law of limitation for execution of decrees of Mofussil Courts is contained in this article. S. 230 of the C. P. Code has not the effect of restoring a right which the law of limitation prevents from being executed, that section only fixing a period after which an application for execution shall not be granted though not barred by limitation. 109 P.R. 1889; 27 P.R. 1888; 9 P.R. 1891.

(b) S. 230 of the C. P. Code does not affect the period of limitation prescribed by art. 180 of this Act. 7 M. 540.

(N. B.)—Cases properly falling under s. 230 of the Code of Civil Procedure, but not under any of the clauses of this article are noted under this article (179) in some Text-Books on limitation. But I have omitted them because they do not properly fall within the scope of this article. The appropriate place for such cases is s. 230, C. P. Code. To put them in here would be to unnecessarily confuse the reader and swell the pages of this book.

(c) Where the previous application for execution has not been put in under s. 230 of the C.P. Code, the general law of limitation, as under this article, will govern the case. 10 B. 348.

(16) Arrangement after decree :—

This article would not apply to an application to enforce an arrangement, made through Court after decree, towards payment of the decree-amount. 7 C. 61.

(17) Applicability of s. 7 to execution-proceedings :—

(a) A minor obtaining a decree may either apply through his guardian for execution or wait until he attains majority and proceed within the time allowed by s. 7. 9 C. 181; 16 B. 536.

(b) If, at the commencement of the periods in column 3 of this article, the person entitled to execute the decree is under a disability, he may make his application within such period (after cessation of the disability) as is allowed by s. 7 of the Act. 20 C. 714 (9 C. 181, *approved*).

(c) If time for execution had commenced to run, before a minor representative became entitled to apply, he is not entitled to the increased period as under s. 7 of this Act. 6 Bom. L.R. 640.

(d) S. 7 of the Act applies only to initial, and not to subsequent, disability. If an adult decree-holder applies for execution and dies, his minor representative must come in within three years from the last application by the deceased; otherwise his application will be barred. 29 B. 68.

(17a) Applicability of ss. 19 and 20 to execution :—

(a) Ss. 19 and 20 of the Act apply to execution-proceedings so as to give fresh starting points from the dates of the acknowledgment of liability or part payments. 5 A. 201; 8 C.W.N. 470.

(b) But see 28 M. 40; 27 M. 608 and 5 M. 171, which hold that the above sections are inapplicable to execution-proceedings.

Scope of article. —(Continued.)

- (c) Ss. 19 and 20 of the Act do not lay down a general rule to the effect that an acknowledgment or part payment by one of the judgment-debtors saves the operation of limitation against all the debtors. 2 A.L.J. 287 = A.W.N. (1905), 108. (Current Index, Execution of decree).

(18) Ascertainment of mesne profits :—

- (1) An application for—is not a proceeding in execution of the decree and is not governed by this article; 25 C. 208; 19 C. 132; 13 A. 53; 25 A. 385; 26 A. 623 = A.W.N. (1904), 146; 24 B. 845; or by article 178—see 19 C. 132.

But see next case.

- (2) An application for determination of mesne profits is to be treated as an application for execution of the decree in which the mesne profits have been allowed. 28 C. 242.

(18a) Award of mesne profits :—

Where a decree awards possession with mesne profits, without specifying the time down to which mesne profits ought to be computed, it ought not to be construed as awarding profits for more than three years from its date. 24 B. 149.

(19) Decree for redemption.

- (a) A—notwithstanding the fact that it grants time to the mortgagor to pay the decree amount, is executable from the date of the decree and is governed by this article. 28 M. 211. (Current Index, Limitation Act).
- (a₁) An application by the holder of a decree for redemption for an extension of the time for redemption is one to execute the decree and is governed by this article. 28 M. 211. (Current Index, Limitation Act).
- (20) A Court can review its own order in execution although an appeal might have been, but was not, preferred. 28 M. 396. (Current Index, Limitation Act).

(21) Mortgage-decree :

This article applies to the execution of a mortgage-decree. 30 C. 761.

Note.—There are certain proceedings and applications in execution, which do not fall directly under any of the six clauses in the last column of this article. The question often arises by which article or by what law they are governed; (e.g.) when execution is stayed by means of an injunction, or other such order restraining execution and when, after the withdrawal of the injunction or after the removal of the restraint, an execution petition is put in, and if more than three years have elapsed between the date of the first application and the renewed application, it may be argued that the latter is barred by this article. Whether such application is or is not barred and which article is applicable thereto is the subject of discussion in the following cases grouped under the general heading :—

Scope of article.—(Continued.)

Revival or continuation of proceedings.

(22) Pending application—Revival :—

(a) Where execution-proceedings commenced by the decree-holder are struck off but not finally disposed of and the next application is, in substance and in form, one to revive and carry through such application, it will not be barred by time. 27 A. 334 (P.G.) = 2 A.L.J. 397 = 1 C.L.J. 381 = 9 C.W.N. 601 = 15 M.L.J. 258.

(a₁) Where, in consequence of an application for setting aside an *ex parte* decree, the application for execution of such decree is struck off and the application for setting aside the *ex parte* decree being finally dismissed, the decree-holder again applies for execution, such application will be a continuation of the first and hence not barred. 14 C. 385; 14 C. 387 (Note.)

(a₂) An application for execution is not necessarily cancelled by being taken off the file. Its effect must be determined by the special circumstances of each case. An application for execution in legal continuance of a previous application struck off the file will not be barred. 16 B. 294.

(a₃) Where, on an attachment of property, the Court strikes off the application for execution maintaining the attachment, and an application is afterwards put in to re-attach the same property and sell it, the latter is a continuation of the previous application because the attachment continued, an application for re-attachment not necessarily implying abandonment of the previous attachment. 179 P.R. 1882.

(a₄) Where, on a suit by a defeated claimant to establish his claim to attached property, the sale of the property in execution is stayed by order of Court, and on the dismissal of the objector's suit, the decree-holder applies for sale of the property in execution, the latter application will be one in continuation of the former proceedings and consequently not barred, notwithstanding the fact that more than three years have elapsed since the last application. 179 P.R. 1882.

(a₅) Where, in consequence of an application to set aside an *ex parte* decree, the Court passes an order indefinitely postponing an execution, pending the disposal of the first mentioned application, and the decree-holder applies for execution after the dismissal of the first mentioned application, his application, will be one in continuation of the one for execution which had been stayed and will be governed by art. 178 and not by this article. 168 P.R. 1883.

But, if the application for execution is postponed for a definite period (say one year), the next application for execution must be put in within the period of limitation provided by this article. 77 P.R. 1884.

(b) Where a sale in execution being set aside, the decree-holder applies again for execution, the latter is not a fresh application but one to revive the former application and will not be barred though more than three years from the date of the former application. 2 A.L.J. 276; 38 A. 482 (F.B.); 4 C. 415 = 3 C.L.R. 46.

Compare the next two cases.

(c) A second application for execution, in consequence of a sale, had and confirmed under the first application in full satisfaction of the decree, since being set aside and the purchase-money refunded to the purchaser under the sale or for some other similar cause, held not a continuation of the first application. 3 A. 484; 7 M. 595.

Scope of article.—(Continued.)

Revival or continuation of proceedings.—(Continued.)

- (c₁) Proceedings on the first application having been postponed at the judgment-debtor's request, the next application praying that the Court might proceed with the said first application was held not to be time barred. 5 A.W.N. 969.
- (d) First application for execution struck off the file on the application of the decree-holder to strike it off, maintaining an attachment. A second application, more than three years after, for further execution, the attachment remaining in force all the time, held to be a continuation of former proceedings and not barred. 8 C.L.R. 261.
- (e) Where an execution-application was struck off, in compliance with an application by the decree-holder assented to by the judgment-debtor to the effect that negotiations were going on between him and the judgment-debtor (a Dekhan agriculturist) and that he would apply again if negotiations failed and the decree-holder applied a second time, the negotiations having failed, the second application was held to be a continuation of the first and not barred. 10 B. 108.
- (f) A further application for execution, the previous application having been struck off the file owing to an order of stay of execution issued by a superior Court, ought to be considered as a continuation of the previous application, notwithstanding the fact that more than three years have elapsed between the first application and the latter. 21 M. 261.
- (g) Where during the continuance of execution-proceedings on a petition for execution, the judgment-debtor's objections relating to execution having been allowed, he preferred an appeal and the appellate Court stayed proceedings and the appeal having been finally dismissed, the records were sent back and the first Court dismissed the original application owing to the default of the decree-holder to pay the costs of issuing, a sale proclamation, a second application for execution by the decree-holder more than three years from the first application was held barred, such second application not being a continuation of the first. 5 C.W.N. 947.

(23) Temporary stay of proceedings :—

Where a decree-holder applied for execution by attachment, the Court refused to issue process on the ground that the property sought to be attached would not be sold, there being claims pending in respect of it. An application for attachment put in after the disposal of the claims held to be a continuation of former proceedings and hence not barred. 4 M.H.C. 261.

(24) First application for attachment—Second for arrest :—

A second application for execution by arrest of the judgment-debtor, the first application being one for attachment and the attachment having become infructuous or inoperative, is not a continuation of the first application. 7 B. 293; 18 A. 9.

(25) Exemption of property from attachment—Second application :—

An order of Court exempting from attachment the life-estates of the widows of a deceased judgment-debtor's son has not the effect of suspending

Scope of article.—(Continued.)

Revival or continuation of proceedings.—(Continued.)

- the execution, because the decree-holder may attach the residue subject to the life-estates. An application for execution, therefore, put in more than three years from the date of the order of the Court will be barred. 120 P.R. 1888.

(26) Intervention of objections and claims:—

- (a) A second application for execution, the first application having been suspended in consequence of an order adverse to the decree-holder in a claim-case and the consequent necessity for a suit by him, which ultimately succeeded, held to be a continuation of the first application. 28 C. 437; 1 A. 355 (F.B.) 5 B. 29; 28 W.R. 188; 28 M. 50 (F.B.) = 14 M.L.J. 401 (overruling 10 M. 22).

But compare 17 C. 368., which holds that an application for execution by a decree-holder, after success in a suit in consequence of the allowance of a claim put in by a third party, is not a continuation of the previous execution-application.

- (a₁) The time occupied by a suit of the decree-holder consequent on the allowance of a claim of a claimant is not a continuation of proceedings and cannot be deducted in computing the period of limitation for execution, when the suit of the decree-holder is ultimately dismissed. 154 P.R. 1890.

- (a₂) Where, on an attachment of property by decree-holder, a claim put in by a third party was allowed and the decree-holder had, in consequence, to bring a regular suit, which, however, was decided against him; he, thereafter, applied for attachment of some other property. Held, the latter application was not a continuation of the previous application for execution and being more than three years therefrom was barred. The case would have been different if the suit had been successful and the released property had been attached again. 30 P.R. 1882.

- (a₃) On an execution-proceedings, the decree-holder was driven to a suit under s. 283 of the C. P. Code but got a decree in his favour. More than three years after the decree, the decree-holder applied again for execution. Held, that the application was time-barred under this article. 19 A. 71 = 16 A.W.N. 186.

(27) Suspension by injunction:—

- (a) Where execution is stayed by means of an injunction issued by the same or some other Court, superior or inferior, and the decree-holder applies again for execution after the withdrawal of the injunction, the latter application will be considered to be a continuation of the former and as such will not be barred, though more than three years have elapsed since the date of the next previous application. 17 A. 425; 15 C. 371; 5 B. 29; 1 A. 355; 5 A. 459 = 8 A.W.N. 89; 6 A. 28 = 3 A.W.N. 181; 26 A. 156 = 23 A.W.N. 221.
- (a₁) Where execution of a decree is stayed by an injunction in another suit by the judgment-debtor to set aside the decree sought to be executed and an application for execution is put in by the decree-holder after the discharge of the injunction in the suit by the judgment-debtor, the latter application will be barred if more than three years had

Scope of article.—(Concluded.)**Revival or continuation of proceedings.—(Concluded.)**

elapsed since the date of the last application for execution, notwithstanding the stay of execution by the injunction. 6 C.W.N. 725.

(b) Where, before execution is taken out, an injunction is issued restraining execution, the period during which the injunction is subsisting, cannot be counted in favour of the decree-holder for purposes of limitation. 11 M. 103.

(c) Where, on an application to set aside an *ex parte* decree, execution is stayed, and the application to set aside the *ex parte* decree is ultimately rejected and the order of rejection is confirmed on appeal, and thereupon, an application to execute the decree is put in more than three years from the date of the decree, the latter application will be governed by this article and not barred, since the decree is not capable of execution until the final order disposing of the petition to set aside the *ex parte* decree. 8 C. 248 = 10 C.L.R. 143.

(28) Suspension by attachment:—

In computing the time for the execution of a decree, the period during which it has remained under attachment should not be deducted. 11 Bom. H.C.R. 206.

(29) Suspension owing to obstruction:—

(a) A second application for execution, the first application for execution having been struck off the file in consequence of a suit by the decree-holder under s. 331, C.P. Code, and the suit having been dismissed, held not to be a continuation of the first application. 20 B. 175 (*distinguishing* 5 B. 29 and 16 B. 294).

(b) But if the decree-holder succeeds in the suit and then applies for execution, the application can be treated as a continuation of prior proceedings for execution. 24 B. 345.

(30) Decree-holder being referred to a suit:—

An application for execution was dismissed, the decree-holder being referred to a suit. He applied again for execution without bringing a suit. That petition was also dismissed. He brought a suit and obtained a decree and then applied again for execution. The last application held not to be a continuation of the previous proceedings. 21 M. 257.

(31) Application of transferee to be placed on record:—

An application put in by a transferee of a decree for substitution of his name on the record would be barred unless put in within three years from the date of the transfer (art. 178). If it is considered as a fresh application for execution, it would be barred unless presented within three years of the last application for execution put in by the decree-holder. 151 P.R. 1882.

Cl. 1.—1.—‘The date of the decree or order.’**(1) Meaning of the words:—**

The words—mean the date the decree ought to bear under s. 205, C.P. Code, (i.e.) the date of the judgment, so that an application made more than three years from the date on which the judgment was pronounced would be barred. 25 C. 109; 1 C.W.N. 93; see, also, 13 C. 104.

Cl. 1.—1.—‘The date of the decree or order.’—(Concluded.)

(2) ‘Decree or order,’ meaning of:—

The words ‘decree or order’ mean a decree or order capable of execution. B.L.R. Sup. Vol. 718=7 W.R. 521.

(3) **Compromise decree omitting time:**

If a decree passed on a compromise omitted to specify the agreed period for payment, time, under this article, would run from the date of the decree. 5 A.W.N. 193.

(4) **Wrong application subsequently amended:**

A wrong application for execution of a decree (for possession of a house obtained by five persons) put in by one of the decree-holders, in the interest of all, for possession of a moiety of the house but subsequently amended after the period of limitation was held not to be barred by limitation, since the application was one under cl. 1 and not cl. 4. 6 A.W.N. 125.

Cl. 2.—(a).—‘Where there has been an appeal.’

(1) **Appeal by one or more of several parties:**

(a) Where a decree is passed against two persons, one of whom alone appeals on a ground not common to himself and the other, time will run against the decree-holder, as regards the non-appealing defendant, from the date of the original decree, and not from the date of the appellate decree on the appeal of the appealing defendant. 4 A. 86.

(b) The article must be construed as applying, without any exception, to decrees from which an appeal has been preferred by any of the parties and should be applied to cases where the whole decree is imperilled by the appeal. 8 A. 578.

But see 23 M. 60=9 M.L.J. 284. (c) *infra*.]

(c) Where there is a joint decree for possession and costs against several defendants, and one of the defendants alone successfully appeals against the decree so far as it relates to possession but the plaintiff in a second appeal gets the original decree restored, time for execution of the decree as to costs would run from the date of the decree in second appeal restoring the original decree. 6 C. 194=6 C.L.R. 573.

(d) Where a decree is passed against two defendants, one of whom alone appeals against the whole decree, the other not appealing at all, limitation for execution against the non-appealing defendant would run only from the appellate decree. 16 C. 598.

(e) It is immaterial whether some only or all of several judgment-debtors prefer an appeal. There is only one decree that can be executed and that is the final decree of the appellate Court. *Per Moore, J.* in 23 M. 60=9 M.L.J. 284.

The consideration of such subtle points as whether a decree was or was not imperilled by an appeal was foreign to the intention of the legislature.

Per O’Farrell, J. in 23 M. 60=9 M.L.J. 284 (12 M. 479 was dissented from in this case).

(f) Where in a suit against several defendants, there is a decree against the shares of some of the defendants, the shares of the rest being exonerated, and the appeal by the plaintiff, which is only as against

Cl. 2.—(a).—Where there has been an appeal.—Continued.)

the exonerated defendants, is dismissed and execution is sought against the shares of the defendants, who were originally made liable, time will run from the original decree and not from the date of the appellate decree. 12 M. 479.

(g) Where a decree is passed severally, not jointly, against several defendants individually and an appeal is preferred only by some of the defendants on a ground not common to all the defendants, time for execution as against the non-appealing defendants will run from the date of the original decree and not from that of the appellate decree. 13 A. 1 (F.B.) Broadhurst and Mahmood, JJ, *contra*.

(h) Where a joint decree was passed against several defendants for possession and damages and on appeal by all defendants but one, all the appealing defendants were exonerated from liability so far as the claim for damages was concerned, the rest of the decree being confirmed, held time for execution as against the non-appealing defendant would begin to run only from the date of the appellate decree. 25 C. 594 = 2 C.W.N. 556 (following 3 C.L.R. 430 and distinguishing 13 A. 1).

(i) Where a decree is obtained against a few only of the defendants, the rest being exonerated from liability, and an appeal is preferred only against the exonerated defendants and dismissed, held, time for execution begins to run from the date of the appellate decree. 4 A.W.N. 138.

Appeal against a decree by one of several defendants will not prevent the period of limitation for its execution running in favour of the others, unless the appeal is such as may imperil the whole decree. 2 C.L.R. 471.

(k) Except in the case where a nominally single decree awards separate reliefs against separate defendants, the words of the article ought to be construed in their natural sense as permitting an extension of limitation where an appeal is preferred and is not withdrawn. 22 B. 500.

The word 'appeal' does not mean only an appeal against the whole decree, and by which the whole decree is imperilled. It means any appeal by any party. *Per Parsons, J*, in 22 B. 500.

(l) Where there is a joint and several decree against several defendants, on one of whom appeal the decree is modified, time begins to run as against the non-appealing defendants only from the date of the appeal decree modifying the original decree. 3 C.L.R. 430.

(2) Appeal from part of decree—Execution of unappealed portion :—

(a) Where the plaintiff preferred an unsuccessful appeal against a part of the decree, which was adverse to him, making all the defendants respondents and then sought to execute the unappealed portion of the decree, held time began to run only from the date of the appellate decree. 19 C. 750 (following 16 C. 598) ; 22 B. 500.

(b) Where a plaintiff obtains a decree only for a portion of the amount claimed by him and unsuccessfully appeals as regards the disallowed portion, time will run for execution even as regards the portion allowed only from the date of the appellate decree. 18 B. 208 ; 23 C. 876.

(c) Where there has been an appeal only from part of a decree, time will begin to run, in the case of execution of the unappealed part, only from the date of the appellate decree. 26 M. 91 (12 M. 479, *dissented from*).

Cl. 2. (a).—Where there has been an appeal.—(Concluded.)

(d) Where an appeal is preferred only against a part of the decree and execution is sought against judgment-debtors, who were not joined as parties in the appeal, time will run from the date of the original decree and not from the date of the appellate decree. 14 C. 26.

(e) Where the plaintiff obtained a decree for pre-emption in respect of four villages and, in consequence of an appeal and second appeal by the defendant, the plaintiff's right was, in second appeal, confined only to three villages, time was held to run, as against the decree-holder, in respect of the three villages from the date of the second appellate decree and not from that of the original decree. 17 A. 108.

Cl. 2.—(b).—'Appel'—'Appellate Court.'

(1) Appeal—Appellate Court:—

(a) The words 'appeal' and 'appellate Court' in the article include an appeal to the Privy Council and the Privy Council respectively. 2 A. 768; 19 W.R. 186; 7 C. 620=9 C.L.R. 404; 4 A. 197.

(b) The words 'Appellate Court' signify the Court or Courts to which the appeal, mentioned in the article, has been preferred. 9 C. 100.

(2) 'Appeal,' what it includes and what not:—

(a) The 'appeal' referred to in this clause is probably an appeal from the decree or order sought to be executed and not an appeal in execution of that decree or order. If, however, the order in appeal is itself in the nature of a decree and capable of execution, time will run from the date of such order. 5 A. 286.

(b) The word—contemplates and means an appeal from the decree and does not include an appeal from an order dismissing an application to set aside an *ex parte* decree. 2 A. 273; 16 B. 123. Cf. 21 C. 387.

(c) Where an application by a judgment-debtor, to revive a suit on the ground that he had no notice of the suit, being rejected, he appealed and the appeal was also dismissed, an application for execution of the original decree made within three years of the dismissal of the appeal by the judgment-debtor was, though more than three years from the date of the first application for execution, held to be in time. 8 C. 248=10 C.L.R. 143.

(d) The words 'where there has been an appeal' would apply not only where there has been an appeal from the decree sought to be executed but also where there has been an appeal from a judgment passed on review of the original judgment. 4 A. 274=2 A.W.N. 25.

(3) Determination of liability for costs:—

When an application was made for refund of costs and the question of liability for costs was litigated between the parties for a long time, limitation would run not from the date of the original order entitling the applicant to a refund but from the date of the final order on appeal determining the question of liability for costs. 25 W.R. 309.

(4) Execution-application pending appeal:—

The period of three years counts, when there has been an appeal, from the date of the appellate decree, notwithstanding the fact that, in the meantime, an application for execution has been put in. 2 M. 174.

Cl. 2.— c) — 'The date of the final decree or order.'**(1) Decree of the highest appellate Court:—**

The period of limitation under this article is to be computed from the date of the final decree of the highest appellate Court. 1 A. 498; 6 A. 14.

(2) Revision by the Chief Court of Punjab:—

(a) Where an application for revision is admitted by the Chief Court of the Punjab, not as one for revision but as a further appeal, the order thereon rejecting the application should be treated as the final order or decree of the appellate Court. 8 P.R. 1905.

(b) An order by a Division Bench of the Chief Court of the Punjab on an application made to it against an appellate decree and referred to a Bench is a final decree or order of an appellate Court for the purposes of this clause. 154 P.L.R. 1905 = 8 P. R. 1905. (Current Index, Limitation Act).

(3) Decree of which Court executable:—

(a) The final decree of the appellate Court is the only decree that can be put in execution. So, dismissal by the Court of an application to execute the original decree cannot affect the subsequent execution of the appellate decree. 19 B. 258; 14 A.W.N. 46.

(b) Such an order must be one disposing of the appeal. 9 C. 100.

(4) Withdrawal of appeal:—

Where an appeal is withdrawn, the date of the withdrawal cannot give a fresh start of limitation for purposes of execution, because there is no 'decree' in appeal. 1 M.L.J. 746; 1 A. 293; 15 B. 970; 13 B. 106.

(5) Dismissal for default:—

An order dismissing an appeal for default cannot give a new start of limitation. 4 M.H.C. 82.

(6) Dismissal on ground of limitation:—

A decree of the appellate Court dismissing an appeal on the ground of limitation is, nevertheless, the final decree of the appellate Court giving a fresh start of limitation for execution. 16 C. 250; 14 A.W.N. 46.

(7) Rejection of appeal for deficiency in Court-fee:—

(a) Where there is an order of the appellate Court rejecting a memorandum of appeal for deficiency of Court-fee, time for execution of the original decree will run from the date of such order. 7 A. 887 = 5 A.W.N. 260.

(b) Cf. 6 A. 438 = 4 A.W.N. 153, which decided that an order rejecting an appeal memorandum for deficiency of stamp is not the final decree of the appellate Court giving a fresh start of limitation for execution.

(8) Abatement of appeal:—

An order of an appellate Court abating an appeal because no representative of a deceased appellant was brought on record is not a final decree of order. In such a case, limitation for execution of the original decree will run from its date. 20 A. 124 = 17 A.W.N. 218.

Cl. 3.—The decision passed on review.

(1) Effect of amendment of decree pending appeal :—

Where an order is passed rejecting an application for execution as being out of time and is upheld in appeal, the mere fact that, during the pendency of the appeal, the decree-holder applied to the Court which passed the decree and obtained an order amending it would not revive the application for execution or give a fresh starting point of limitation. 8 A. 492 ; 20 A. 304.

(2) Effect of refusal of review :—

The clause would not apply where the review applied for is refused. 10 M. 66.

(3) Order amending decree :—

(a) An order, under s. 206, C. P. Code, amending a decree is an order passed on review within the meaning of this article. 25 C. 258 = 2 C.W.N. 219.

But see, *contra*, 2 A.L.J. 287 = A.W.N. (1905), 108.

(b) An order, under s. 206, C. P. Code, amending a decree so far as costs are concerned is one substantially made on review for purposes of this clause. 24 M. 25.

(4) Effect of amendment after decree ;

An amendment of a decree in accordance with a compromise after the decree is inoperative and time under this article will therefore run from the date of the original and not of the amended decree. 24 M. 1.

Scope of cl. 4.

(1) Cl. 4 of this article requires a direct and independent application by the decree-holder for execution on his own account. 7 A. 898.

(2) An application, by the judgment-debtor, for postponement of sale assented to by the decree-holder is not an application by the 'decree-holder,' within the meaning of this article so as to give a fresh start of limitation. 28 M. 40.

(3) Where a decree is partly in favour of the plaintiff and partly in favour of the defendant, an application for execution by the former of his portion of the decree cannot prevent limitation running against the latter. 22 B. 298.

(4) If an application for execution is duly made, the fact of its dismissal would not prevent its furnishing a fresh starting point of limitation. 11 B. 467.

(5) The day on which an application for execution is made cannot be reckoned in computing the period of three years. 4 M.H.C. 32.

(6) The three years' limitation must be calculated from the date of the application and not from the date of the hearing thereof or order thereon. 1 C.W.N. 260 ; 1 A. 580 ; 22 B. 722.

(6a) The time, from which limitation runs, is the date of applying and not the date on which an application for execution is disposed of. 80 C. 761 (following 1 A. 580 and 1 C.W.N. 260).

(7) A verbal application is as effectual to give a fresh start of limitation as a written one ; where the order is such that it could not have been made except on an application, the Court may presume that an application had been made. 23 B. 723.

Scope of cl. 4.—(Concluded.)

- (8) This article does not include a suit to set aside an order on a claim petition. 17 C. 268.
- (9) An application for the substitution of the legal representatives of a deceased judgment-debtor is one for execution giving a fresh start of limitation. 2 C.L.J. 544. (Current Index, Limitation Act.)

Cl. 4.—(a)—‘In accordance with law.’

- (i)—Applications ‘in accordance with law.’

Meaning of the words:—

- (a) The phrase ‘in accordance with law’ is adjectival not only to the words ‘to the proper Court for execution’ but also to the words ‘to take some step in aid of execution.’ So, if the previous application had been barred by limitation, it could not give a fresh starting point. 22 B. 83.
- (b) An application, therefore, to constitute a step in aid of execution must be in accordance with law (i.e.) it must be one praying for some relief which the Court moved is competent to grant. 1 N.L.R. 61; 2 A.L.J. 876 = A.W.N. (1905), 182.
- (c) The expression ‘applying in accordance with law’ means applying to the Court to do something in execution which, by law, that Court is competent to do. Hence an application to arrest the judgment-debtor in contravention of s. 841 of the C. P. Code or one to bring mortgaged property to sale in contravention of s. 99 of the Transfer of Property Act is not one in accordance with law. 12 A. 64.

I. EXAMPLES OF APPLICATIONS ‘IN ACCORDANCE WITH LAW.’

- (a) An application for attachment of property *bona fide* believed by the decree-holder to belong to the judgment-debtor but which, on enquiry, is found not to belong to the latter is nevertheless one in accordance with law so as to give a fresh start of limitation. 6 P.R. 1895 (referring to 12 A. 64; 20 C. 888 and 12 B. 427).
- (b) An application for execution against the alleged representatives of the judgment-debtor (subsequently found not to be the real representatives), is nevertheless one in accordance with law so as to give a fresh start of limitation. 12 A.W.N. 241.
- (c) An application filed merely with the object of keeping the decree alive and not in expectation that any effectual steps could be taken against a judgment-debtor, who was then absent, held to be one in accordance with law and to give a fresh start of limitation. 28 P.R. 1888.
- (d) But see 41 P.R. 1884, which holds that an application merely to keep the decree in force, not being one to execute the decree or to take any step in aid of execution, could not give a fresh starting point.
- (e) An application to execute, although not accompanied by the necessary heirship or succession certificate. 16 A. 26; 27 P.R. 1894; 54 P.R. 1898; 20 B. 76.
- (f) So, also, where the legal representatives apply for execution without obtaining a certificate of succession and without having their names substituted on the record. 20 C. 755.
- (g) An application for execution though not sufficiently stamped. 6 M. 181.

Cl. 4.—(a)—'In accordance with law.'—(Continued.)

I. EXAMPLES OF APPLICATIONS 'IN ACCORDANCE WITH LAW.'—(Contd.)

(h) An informal application for execution allowed to remain on the file subject to amendments to be made under orders of Court. 12 C.L.R. 279.

(i) An informal application for execution not containing the particulars required by the C.P. Code and allowed by the Court to be on the file notwithstanding its non-amendment within the fixed time and amended after the expiry of the period of limitation. 10 C. 541.

Compare 23 C. 217 and other cases noted therewith.

(j) An application for execution defective as to the date of the decree but since amended with permission of the Court is one in accordance with law, because the amendment when made relates back to the date of the application. 13 A.W.N. 112; 20 A. 478=18 A.W.N. 121.

(k) An application for execution not containing the particulars required by s. 235 of the C. P. Code and returned for amendment but not amended is nevertheless an application in accordance with law. 16 M. 142; 6 M. 250.

(N.B.)—In the latter case, the application was returned for amendment, but the application was not proceeded with. Notwithstanding that, it was held to be one in accordance with law.

(k₁) An application for execution defective only as to the date of a previous application (such date being immaterial) and the defect being supplied by amendment within three days after an order for amendment. 23 A. 162=21 A.W.N. 31; following 25 C. 594 (F.B.).

(l) A defective application for execution, under s. 235, C.P.C., omitting to state the relief prayed for will, nevertheless, be one in accordance with law so as to give a fresh start of limitation, if the Court receiving the application had not returned it for amendment. 23 P.R. 1888.

(m) An application for execution defective as regards all the particulars required by cl. (f) of s. 235 of the C.P. Code is nevertheless one—12 A.W.N. 114.

(m₁) An application for execution, notwithstanding an omission to specify the properties to be attached, is one in accordance with law so as to give a fresh starting point. 14 C. 124.

(m₂) But this decision was overruled by 17 C. 631 (F.B.) which ruled that such an application, not amended within the time allowed by the Court therefor, is not one in accordance with law so as to give a fresh start of limitation.

(n) An execution-application will be one in accordance with law notwithstanding mistakes and defects of a formal character. 21 W.R. 97 (P.C.); 12 C. 161.

(o) A mere clerical error in an application for execution such as the misdescription of former records referred to therein cannot make the application one not in accordance with law. 11 A.W.N. 154.

(p) An application for execution notwithstanding that the *Vakalatnamah* of the decree-holder's Vakil was undated, the Vakil being otherwise duly authorized. 26 M. 197.

(q) Where a decree is transferred really or nominally by an assignment in writing, the application for execution of the assignee or *begamidar* is——. 20 C. 888; 21 M. 888; see, also, 5 C.L.B. 258 & B.L.R. App. 40; 14 B.L.R. 425 (Note)=19 W.R. 255.

Cl. 4. —(a)—'In accordance with law.'—(Continued.)

I. EXAMPLES OF APPLICATIONS 'IN ACCORDANCE WITH LAW.'—(Concl'd.)

- (r) Where an assignee, by operation of law, of a portion of a decree applies for execution of the whole decree, the holder of the other part of the decree not joining him, such application of the assignee will keep the decree alive, as regards the latter. 14 M. 252 (reversing, on review, 13 M. 847).
- (s) An application for execution, though under a defective power-of-attorney, if no objection had been taken when the application under the defective power was pending. 105 P.R. 1882.
- (t) An application for execution of a decree by an agent holding a power-of-attorney under two decree-holders, one of whom was dead at the date of the application but not known to the agent at the time is nevertheless one——. 18 C.L.R. 18.
- (u) A decree was passed in favour of a firm in the name of an agent. Another agent of the firm put in some applications for execution. Within three years of the last of the latter applications, the firm itself applied for execution. Held, the applications for execution put in by the agents other than the one in whose name the decree was passed were, however irregular, applications in accordance with law such as could give fresh starting points. 1 A. 510.
- (v) An application, by the real decree-holders, under s. 232, C. P. Code, for execution dismissed on the ground that they failed to prove that they were the persons beneficially entitled under a decree obtained in the name of a third person held sufficient to save the next application by them within three years, when they proved that they were beneficially entitled under the decree. 5 C.L.R. 253.
- (w) An application for execution of a decree obtained against a minor represented by his mother and guardian, execution being asked for against the mother personally is, notwithstanding the technical defect, substantially one against the minor and thus in accordance with law so as to give a fresh starting point. 12 B. 427.
- (x) An application for execution by the decree-holder though the decree is under attachment. 13 M.I.J. 265.
- (y) An application for execution of a mortgage decree by sale may be treated as an application in accordance with law for an order absolute under s. 89 of the Transfer of Property Act, although it did not, in specific terms, ask for such an order. 2 A.L.J. 371 = A.W.N. (1905), 136.
- (z) An application for an attachment of a portion of the judgment-debtor's property will keep the decree in force as regards the residue of his property or his person. 2 B. 294.
- (aa) An application for execution, though, struck off for default of the decree-holder to pay process-fecs. 24 W.R. 459.
- (bb) An application for a seal-warrant to the Small Cause Court at Calcutta is one made 'in accordance with law' and is a step in aid of execution. 20 C. 580.
- (cc) An application for execution against one of the judgment-debtors, who might have been dead at the time (the death not being known to the applicant). Such an application is sufficient to give a fresh starting point of limitation as against all the judgment-debtors. 2 C. 44 (Current Index, Limitation Act).
- (dd) An application for execution against some of several representatives of a deceased judgment-debtor will keep the decree alive as against all. 3 A. 517 = 1 A.W.N. 16.

Cl. 4.—(a)—‘In accordance with law.’—(Continued.)

II.—APPLICATIONS ‘NOT IN ACCORDANCE WITH LAW.’

- (a) The Court cannot lawfully issue execution in respect of a barred decree
 - whether the judgment-debtor raises the plea or not, because Courts are bound by rules of limitation whether set up as a defence or not. So, an application for execution barred by limitation will be one not in accordance with law and cannot give a fresh start of limitation. 24 W.R. 399; 8 C.L.R. 385.
 - (b) It is open to a joint judgment-debtor, who was not a party to the previous application, to show that that application was itself barred as having been presented out of time and therefore could not save limitation and keep the decree alive. 27 B. 210; 28 C. 122.
 - (c) An application for execution of a decree already barred by limitation is not a valid application, though process had been issued thereon, and cannot give a fresh starting point. 5 C. 894 = 6 C.L.R. 437.
 - (d) Bar of limitation in respect of a previous application, at its presentation, cannot be set up by the judgment-debtors as a bar to a later application for execution of the decree. 24 A. 282.
 - (e) An application by a person not on record at the time, cannot be regarded as one for execution of the decree. 24 W.R. 10.
 - (f) An application for execution made, after the death of the judgment-debtor, without the legal representatives of the latter being brought on the record. 19 A. 337 (*distinguishing* 12 A. 440).
 - (g) An application for execution by an agent, under a general power-of-attorney, when the decree-holder himself was within jurisdiction. 23 A. 499 = 21 A.W.N. 161; 26 A. 19 = 23 A.W.N. 172.
 - (h) An application for execution put in by the pleader of a decree-holder after the latter's death. 7 A. 564.
 - (i) An application, under s. 232, C. P. Code, for the substitution of the applicant's name on the record, either as a representative of the original decree-holder or as his assignee, cannot give a fresh starting point of limitation. 9 C. 633 = 12 C.L.R. 146; 16 C. 355; 20 C. 388; 10 W. R. 127; 5 C.L.R. 253.
 - (j) But see 5 B. 246, which holds that an application by the representative of a deceased decree-holder to substitute his name on the record and to execute the decree is an application to enforce the decree.
 - (k) An application for execution put in without a copy of the decree. 5 Bom. I.R. 394.
 - (l) An application defective, as regards the particulars required by cl. (g) of s. 235, C.P. Code and not amended by the decree-holder though invited by the Court to do so. 10 A.W.N. 98.
 - (l₁) An application for execution defective as to the particulars required by s. 235 and returned for amendment within a fixed time but not amended and re-presented within the time fixed. 23 C. 217 (*distinguishing* from 16 M. 142 and 6 M. 250).
- Compare 7 A. 359; 6 B. 681; 17 C. 631; 12 C.L.R. 379; 10 C. 541.
- But applications not materially defective are, notwithstanding the defects, applications in accordance with law so as to give a fresh starting point. 25 C. 594 = 2 C.W.N. 556 (F.B.).
- (m) An improper application to a Civil Court to order the Collector to amend his revenue-record by substituting the names of the decree-holders in

Cl. 4.—(a)—'In accordance with law.'—(Continued.)

II.—APPLICATIONS 'NOT IN ACCORDANCE WITH LAW.'—(Continued.)

the place of the judgment-debtor, whereas the application ought to have been to send the decree to the Collector for his information, held not to be one in accordance with law so as to give a fresh starting point. 4 A. 84.

(n) An application for the partial execution of a joint-decree by one of the joint decree-holders. 1 A. 281; 5 A. 27.

(o) An application by some only of several joint-decree-holders for partial execution of a joint-decree. 4 A. 72=1 A.W.N. 120.

(p) But, if no objection were taken to such application at the time, it will be treated as in accordance with law so as to give a fresh start of limitation. 7 A. 282=5 A.W.N. 41.

(q) Where a decree based on a mortgage is one partly under s. 88 and partly under s. 90 of the Transfer of Property Act and the decree-holder applies for remedy against the judgment-debtor before exhausting the mortgaged property, such an application cannot be one in accordance with law so as to give a fresh start of limitation. 2 A.L.J. 376= A.W.N. (1906), 132.

(r) An informal application in the nature of an ordinary petition to give effect to a previous application for execution by overruling certain objections by the Collector may not be an application for execution 'in accordance with law.' 1 B. 59.

(s) An agreement professing to be one in substitution of the decree but not reported to the Court passing the decree or sanctioned by it is not one that can give a fresh starting point. Nor can an application to any Revenue Officer, other than the Court passing the decree, to give effect to the agreement be regarded as one made in accordance with law to take some step in aid of execution. 190 P.R. 1882.

(t) An irregular application for restoration of an execution-case struck off the file, containing none of the particulars required by s. 207 of the old Code held not an application for execution within the meaning of the article. 9 W.R. 390. So, also, an application for execution not containing any of the particulars required by s. 212 of the old Code (=s. 235 of the present C. P. Code). 21 W.R. 309; 10 W.R. 428.

(u) An application for execution made to a wrong Court without specifying the mode of execution may not be 'one in accordance with law.' 7 N.W. P.H.C. 79.

(v) An application for execution by attachment of the moveables of the judgment-debtor unaccompanied by an inventory required by s. 286, C.P. Code. 2 A.W.N. 70; *Ibid.* 47; compare 17 A. 520=15 A.W.N. 54.

(w) But an application for execution by attachment of property not stated to be whether moveable or immoveable and not containing an inventory does not prevent it from being one in accordance with law. 12 A.W.N. 55.

(x) An application for execution, by attachment of immoveable property, not containing the particulars required by s. 287, C.P. Code. 12 A.W.N. 8.

(y) An application for attachment of the judgment-debtor's property forbidden by s. 24 of Act XVII of 1879 (The Dekkhan Agriculturists' Relief Act) is not one in accordance with law so as to give a fresh starting point. 10 B. 91.

Cl. 4.—(a)—‘In accordance with law.’—(Concluded.)

II—APPLICATIONS ‘NOT IN ACCORDANCE WITH LAW.’—(Concluded.)

- (a) An application for execution asking merely to issue a notice to the judgment-debtor with the object of keeping the decree unexecuted and not seeking the assistance of the Court towards execution thereof cannot save limitation. 9 C.P.L.R. 15.
- (aa) An application not asking for any step towards execution is not one in accordance with this article and can't give a fresh starting point. 7 B. 459.
- (bb) An application for execution after more than three years from the date of the last application. U. B. R. (1905), Civil Procedure, 26. (Current Index, Limitation Act).
- (cc) An application for execution made by a guardian on behalf of one found to be a major at the time. 28 M. 396. (Current Index, Limitation Act).

Cl. 4.—(b)—‘The proper Court.’

- (1) ‘Proper Court’ means the Court whose business it is to execute the decree, either by transfer or otherwise. 21 W.R. 410; 6 B. 81.
- (2) Where a decree is transferred by the Court which passed it to another Court for execution and the latter Court has made its return, an application subsequently made to the latter Court without a fresh certificate from the Court which passed it is nevertheless one to the proper Court sufficient to keep the decree alive. 168 P.R. 1888.
- (3) An application under s. 223, C. P. Code, for a second certificate made to the Court passing a decree, (when the decree had been sent by such Court for execution to another Court and application was pending in the latter Court) is not one to a proper Court within the meaning of this article. 2 A.W.N. 171.
- (4) An application made to the Court, to which the decree had been transmitted for execution, for a re-transfer of the same, is an application to the ‘proper Court’ and would give fresh starting point. 2 C.W.N. cclxi.

Cl. 4.—(c)—‘Step in aid of execution.’

I—What are steps in.....

- (a) An application by a decree-holder praying for the disallowance of the objections of the judgment-debtor to a sale in execution and for confirmation of the sale. 5 A. 576; 21 C. 23.
- (b) An oral application for a fresh proclamation of sale, the sale, originally fixed, being adjourned. 3 A. 189; 10 C. 851.
- (c) So, also, an oral application for sale of property already attached. 15 B. 405. 17 C. 53.
- (d) So, also, an application by the judgment-creditor for sale of property attached subject to the mortgage of a claimant. 15 C. 363.
- (e) An application for attachment of property, such application not being in itself one for execution. 105 P.R. 1892.
- (f) A decree-holder's application to be put in possession of property purchased by him in execution. 19 A. 477; 27 C. 709 = 4 C. W. N. 681.

CL. 4. (c).—‘Step in aid of execution.’—(Continued.)

I.—What are steps in.....(Continued.)

- (g) An application under s. 87 of the Transfer of Property Act. 12 A.W.N. 45 (12 A. 61 and 13 A. 275).
- (h) An attempt to settle accounts in Court relating to a decree. 6 W.H. Mis. 48.
- (i) An application, in execution-proceedings, to have witnesses summoned to give evidence in relation to a claim preferred by a third party. 5 A. 344.
- (j) An application by a decree-holder to Court for a certificate that a copy from the Revenue Registry is necessary to enable him to attach property. 5 M. 141.
- (k) Deposit of *nilamce* fees. 9 C. 644.
- (l) Deposit of process fees. 23 C. 374.
But see 22 B. 722, which decides that ‘mere payment of process-fees or *battah* under circumstances from which no application can be inferred is not a———.
- (m) Payment into Court of postage stamps in pursuance of an application for transmission of decree to another Court for execution. 7 M. 307.
- (n) An application by the decree-holder to set off the amount realized by sale towards the decree amount. 8 O.C. 161.
- (o) An application by a decree-holder for leave to bid at a sale. 13 A. 211; 21 B. 381; 22 A. 399; 8 O.C. 161.
But see 23 C. 690, which holds that such an application is *not* a step in aid of execution.
- (p) An application for transfer of a decree to another Court for execution. 1 A. 625; 2 A. 284; 6 C. 513 = 7 C.L.R. 521; 22 C. 375; 2 C.W.N. 415; 20 C. 29; 6 A.W.N. 137; 51 P.R. 1870.
- (q) So, also, an application for re-transfer of a decree to the Court, which passed it, for execution. 6 M. 81; 2 C.W.N. cclxxi.
- (r) An application for execution by a transferee of a decree notwithstanding that the same is unsuccessful. 19 A.W.N. 16.
- (s) An application by the assignee of a part of the decree for execution of that part is sufficient to keep the decree alive as regards the other part. 1 M.L.J. 240.
- (t) An application by the assignee of a mortgage-decree for sale of the mortgaged property, notwithstanding the fact that the assignment is unregistered is a———. 13 A. 89.
- (u) An application for partial execution of a decree though not ‘in accordance with law.’ 15 B. 242; 15 B. 245; 26 C. 888.
- (v) An application requesting payment of money realized in execution and deposited in Court. 2 M. 174; 17 M. 165 = 3 M.L.J. 296; 6 A. 366.
- (w) Even if the application should be an oral one. 22 B. 340.
But see 8 C. 89 = 10 C.L.R. 272; 10 C. 549.
- (x) An application, however, for payment to the decree-holder of money realized by a Receiver (appointed during pendency of suit) not in execution of the decree, *held* not a step in aid of execution of the decree. 22 M. 448.
- (y) An application by a decree-holder for an order to withdraw money due to him under a previous order for rateable distribution. 8 C.W.N. 382.

Cl. 4.—(c).—‘Step in aid of execution.’—(Continued.)

I—What are steps in.....(Continued.)

- (a) An application by a decree-holder certifying payments made by the judgment-debtor out of Court is a——. 9 A. 9; 12 C. 608; 12 A. 399.
- (aa) So, also, an application made by the judgment-debtor and countersigned by the decree-holder reporting part-satisfaction and asking for time to pay the balance. 20 C. 696.
- (aa₁) So, also, a joint application by the judgment-debtor and the decree-holder reporting satisfaction of the decree in part and asking for postponement of a sale for four months is a——. 4 A. 60.
- (bb) An application reporting adjustment of decree and stating that judgment-debtor will pay the balance due under the decree in instalments. 3 A. 320.
- (cc) An application by the decree-holder reciting an arrangement made between the parties as to payment of the decree amount in certain instalments and asking the Court to summon the judgment-debtor with a view to recovery of the amount still due. 26 P.R. 1894.
- (dd) An application to recover the costs awarded by a decree is a——. 15 B. 245.
- (ee) Where a decree is for costs and for possession, an application for execution as regards costs will be a step in aid of execution so as to keep the decree alive as regards possession. 17 A.W.N. 31.
- (ff) An application by the representatives of a deceased decree-holder to be substituted on the record and to be allowed to continue execution-proceedings. 19 B. 261.
- (gg) A judgment-creditor's application for substitution on the record of the heirs of a deceased judgment-debtor. 24 C. 778 = 1 C.W.N. 676.
- (hh) An application by a judgment-creditor to execute his decree, which has been attached by another person in execution of his decree, is a step in aid of execution notwithstanding the fact that the application is unsuccessful. 24 C. 778 = 1 C.W.N. 676.
- (ii) An application for execution of an attached decree. 7 A. 382.
- (jj) An application for adjournment of sale put in by the judgment-debtor and assented to by the decree-holder and the striking off of execution-proceedings in consequence held to constitute a——. 5 C.L.R. 515.
- (kk) An application, by the decree-holder's pleader, consenting to an application by the judgment-debtor to sue postpone sale but insisting that certain lands, other than those mentioned by the judgment-debtor, should be sold first. 7 M. 306; 7 M. 307.
- (ll) An application to a Court not having, but *bona fide*, though erroneously, believed by the applicant to have, jurisdiction, will be a step in aid of execution especially when the Court acts on the application. 7 I.A. 167 = 2 A. 792 (P.C.)
- (mm) Any defect or mistake in an application for execution would not render it the less a step in aid of execution, if the application were by a person legally entitled to execute the decree. 17 M. 76.
- (nn) Whether a particular act is or is not an application for, or step in aid of, execution depends upon the nature of the act rather than the time at which it may possibly be done. 17 M. 165.
- (oo) Proceedings taken before the High Court to send down Privy Council decree for execution. 19 W.R. 301.

CL. 4.—(c).—‘Step in aid of execution.’—(Continued.)

I.—What are steps in.....(Concluded).

- (pp) An application for execution will be a step in aid of execution’ and give a fresh start or limitation notwithstanding the fact that it is struck off at the request of the applicant. 22 P.R. 1905=57 P.L.R. 1905.
- (qq) A previous application for execution, though struck off, will afford fresh starting point for limitation under this article. 17 A. 106.
- (rr) An application to strike off a pending application for execution with liberty to make a fresh application. 16 A. 75.
But see 28 C. 817.
- (ss) An application for execution dismissed for non-payment of process-fee.
* 16 M. 452.
- (tt) An application for execution of a decree struck off the file, for some formal defects. 28 B. 644.
- (uu) An application for review of an order striking off an execution-case and for restoring it to file. 27 C. 285.
- (vv) A ‘batta memorandum’ which applies for the issue of a sale proclamation and on which a sale proclamation is issued although an order for the the issue of such proclamation might have been issued previously. 28 M. 899. (Current Index, Limitation Act).
- (ww) An application by a decree-holder to continue an attachment but to stay a sale. 2 M. 218.

II.—What are not ‘steps in aid of execution.’

- (a) An application for execution praying for a relief outside the decree is not one in accordance with law nor a step in aid of execution so as to give a fresh start of limitation. 13 B. 297.
- (b) An application for execution not in accordance with the terms of the decree. 98 P.R. 1901.
- (c) Under the present law (art. 179, cl. 4), an application cannot be made merely to keep the decree in force. 13 M.L.J. 412.
- (d) A petition praying that a pending execution may be disposed of along with the petitioner’s application for execution in another suit. 25 W.R. 94.
- (e) An application to withdraw a pending application for execution with liberty to put in a fresh application later on. 28 C. 817 (*dissenting* from 16 A. 75).
- (f) The mere act of confirmation, by Court, of a sale, such act not being one in consequence of an application by the decree-holder-purchaser. 10 C.L.R. 380; 12 C. 441.
- (g) Petitions in execution, which are struck off for default, cannot be treated as steps in aid of execution keeping the decree alive. 2 B.L.R.A.C. 126=11 W.R. 80; 9 W.R. 565; 2 A. 285.
- (h) Proceedings in execution to enforce a barred decree. 1 A. 350.
- (i) A suit by a decree-holder for a declaration that property released from attachment on the claim of a third party is liable to be attached. 17 C. 268.
- (j) An application by decree-holder praying for release of portion of attached property and striking off an execution-case. 20 C. 255.

Cl. 4.—(c).—‘Step in aid of execution.’—(Continued.)

II.—What are not ‘steps in aid of execution.’—(Continued.)

- (k) Steps which a decree-holder takes in opposing an application of the judgment-debtor under s. 258. C.P.C. 4 C.W.N. clii.
- (l) A written application by the decree-holder, in execution-proceedings, to communicate to him the date fixed for hearing. 29 P.R. 1885.
- (m) The mere appearance of a decree-holder by his pleader to oppose an application by the judgment-debtor for the setting aside of a sale is not a step in aid of execution, the article contemplating only those applications having for their object some order of the Court in furtherance of execution. 16 C. 747.
- (n) The action taken by a judgment-creditor in opposing an appeal by a judgment-debtor against an order in execution. 5 C. 595.
- (o) A decree-holder's application to postpone a sale for reasons other than procuring the sale at a greater advantage. 20 C. 255; 30 C. 761=8 C.W.N. 251.
- (p) An application by the decree-holder opposing that of the judgment-debtor to sell the properties in a particular order. 30 C. 761=8 C.W.N. 251 (*distg.* 7 M. 306).
- (q) An application by a decree-holder to postpone a sale. 3 A. 757.
- (r) An application for time to pay the decree-amount. 27 C. 285.
- (s) An application for stay of execution. 1 A. 580.
- (t) An application by a decree-holder for leave to bid at a sale. 23 C. 690; 88 P.R. 1894 (*following* 107 P.R. 1881).
- (u) An application under s. 223, C. P. Code, for a certificate of non-satisfaction and for transfer of a decree to a Foreign Court for execution. 107 P.R. 1881.
- (v) Application for copy of a decree, with intent to apply for execution. 11 M. 686.
- (w) An application for return of a copy of the decree filed along with a previous application. 23 B. 311.
- (x) An application for lists of properties attached. 21 M. 400.
- (y) An application by the decree-holder to the Court to which a decree is transferred for execution for return of the decree, the same having been partially executed by such Court. 22 C. 827 (*distg.*, 6 M. 81).
- (z) An incorrect certificate put in by a decree-holder under s. 258 of the C. P. Code. 8 A.W.N. 23.
- (aa) An application under s. 206, C. P. Code, to bring a decree into conformity with the judgment. 13 A. 124; 4 A. 137; 8 A. 492; 20 A. 304.
- (bb) An application by a decree-holder-auction-purchaser for confirmation of sale. 9 C.W.N. 193.
- (cc) An application by a benamidar cannot afford a fresh starting point in favour of the real decree-holder. 9 C. 638=12 C.L.R. 143; 16 C. 355; 20 C. 388; 5 C.L.R. 258.
- (dd) The application of the legal representative of a decree-holder for execution or to withdraw money in Court, without having her name substituted on the record. 11 C. 227.
- (ee) The mere payment of *batta*, in execution-proceedings without any written application in connection with the payment. 25 B. 689=3 Bom. L. 275; 21 A.W.N. 42 (*ref.*, 9 C. 644 and 23 C. 196).

Cl. 4.—(c).—‘Step in aid of execution.’—(Concluded.)**II.—What are not ‘steps in aid of execution.’—(Concluded.)**

(ff) Mere payment of process-fee not accompanied by an application or under circumstances from which no application can be inferred is not a step
——. 22 B. 722; 22 A. 358; A.W.N. (1900), 88.

(gg) Payment of additional or deficient process-fee. 20 B. 179.

(hh) The mere payment of Court-fee with a view to obtain leave to bid at a sale in execution. 9 C. 730=13 C.L.R. 91.

(ii) An application by the decree-holder to receive the poundage-fee in respect of a purchase by him, at auction-sale, of property belonging to the judgment-debtor. 22 C. 527; 23 C. 196.

(ij) An application by a decree-holder praying that he may be allowed to set off, as against the amount due to him under the decree, a certain amount being the purchase-money payable by him for purchase of judgment-debtor's property at Court-sale. 23 C. 196.

(kk) A receipt given by a decree-holder for money received by him in execution. 68 P.R. 1884.

(ll) An application to take out of Court money deposited by the judgment-debtor. 48 C. 89=10 C.L.R. 272; 10 C. 549.

But see 2 M. 174.

(mm) An application for payment out of money in Court. 27 P.R. 1888; 107 P.R. 1881 and 87 P.R. 1884.

(nn) An application by a decree-holder, who is awarded rateable distribution, for withdrawal of moneys so awarded. 10 C.W.N. 28. (Current Index, Limitation Act).

(oo) An application under s. 257A for sanction to give time to a judgment-debtor to pay the decree-amount, such sanction not having been given. 19 M. 67.

Cl. 5.—(a).—‘The date of issuing a notice’ s. 248, C.P.C.)

(a) The clause would apply only when the notice has been actually issued; time would run only from the date of issue of the notice and not from the date of the order for its issue; a mere order of the Court for the issue of a notice is not at all enough to give a fresh start of limitation. 23 B. 35.

Cf. 27 B. 622, &c., (case f, *infra*).

(b) The issue of a notice under s. 249, whether on a valid or invalid application for execution, is enough to give a fresh starting point. 15 A. 84.

(c) So, also, where the application for execution was defective. 23 C. 594=2 C.W.N. 556.

(d) If, on the last of a series of applications, it appears that the next previous application had been barred by limitation, the mere fact that a notice under s. 216 of the Code of 1859 (=s. 248 of the present Code) had been served on the judgment-debtor and he allowed it unchallenged cannot save the last application from the bar of limitation. 2 M. 1; 8 C. 518=1 C.L.R. 408.

(e) The issue of a notice under s. 248, C.P.C., affords a fresh start of limitation for execution. 1 A. 675; 14 A.W.N. 96.

(f) Time runs from the date of the order directing notice to issue and actual service of the notice is not necessary. 27 B. 622; F.A.W.N. 120; 10 A.W.N. 244; 6 C.W.N. 656.

Cl. 5.—(a) 'The date of issuing notice' (s. 248, C.P.C.).—(Concluded.)

- (i) An application by a judgment-debtor in which notice issued to the judgment-debtor was sufficient to keep the decree alive. 2 B.L.R. Ap. 18=11 W.R. 22; 4 O. 403.
- (h) Notice under s. 248, C.P. Code, issued by a competent Court would save limitation, notwithstanding some defect in the application, the conditions required by this clause being satisfied when the fact of the issue of the notice is established. 22 P.R. 1905=57 P.L.R. 1905.

(Old Law)

- (a) The issue of a notice under s. 216 of the old Code of 1859 (=s. 248 of the present Code) and service thereof gave a fresh starting point. B.L.R. Sup. Vol. 492=6 W.R. Mis. 98; 9 W.R. 443; 18 W.R. 193; 12 W.R. 22; 24 W.R. 227; 8 W.R. 306; 5 W.R. Mis. 5; 8 W.R. 208; 4 W.R. Mis. 6; 6 B.L.R. Ap. 143; 6 W.R. Mis. 97; 9 W.R. 330; 5 M.H.C. 100; 19 W.R. 102; 22 W.R. 484; 23 W.R. 195.
- (b) Mere issuing of a notice was enough to give a fresh start of limitation. 14 B.L.R. 143 (F.B.)=22 W.R. 512; 14 B.L.R. 144 (Note)=22 W.R. 154; 23 W.R. 327; 22 W.R. 546; 1 A. 675.

Cl. 6.—Payment, 'which the decree directs to be made at a certain date.'

(1) Decree for redemption :—

- (a) A decree for redemption directing the payment of the mortgage-money within a term fixed by it should be taken to be one executable from the passing of the decree. 48 M. 211.
- (b) Where a redemption-decree does not, in effect, mention any date for payment of the mortgage-debt, it must be taken as operating from its date and as enforceable within three years from such date, unless kept alive by applications from time to time, as prescribed by this article. 23 B. 592; 18 B. 597; 16 B. 480.
- (c) Where a decree for redemption does not specify the results of non-payment of the mortgage-debt within the time specified for payment, the decree-holder can execute the decree at any time within the period prescribed by this article. 14 A. 350=12 A.W.N. 40. But see 16 A. 65=13 A.W.N. 222 (which dissent from the above) and 14 A. 529=12 A.W.N. 108.

(2) Decree for sale :—

A decree directing the sale of the mortgaged property in default of payment of the mortgage money declared due on or before the date fixed in the decree does not come under this clause. If there is also a personal decree, it will come under it. 26 M. 780=13 M.L.J. 412.

(3) Decree for money :—

- (a) Where, in the case of a decree for money, on the application of the judgment-debtor setting out the terms of an arrangement come to between the decree-holder and himself for the payment of the decree-amount by instalments, the Court merely passed an order to the effect that the petition might be with the records, without altering the decree, and without directing that the decree-amount might be paid at certain dates other than those specified in the original decree, *held*, that the instalments mentioned in the arrangement did not give fresh starting

Cl. 6. Payment which the decree directs to be made, &c. (Continued.)

- points of limitation and that an application for execution made more than 12 years from the date of the decree and more than three years after the last step in aid of execution was barred. 89 P.R. 1894.
- (b) An order of Court filing a petition presented by the parties to a decree stating that they had agreed for payment of the decree amount by instalment would not amount to an order directing a payment to be made at a certain date so as to afford fresh period of limitation under s. 280 (b) of the C.P. Code (Act X of 1877). (cf. art. 179—6). 4 A. 155.
- (c) The declaration in a decree that a certain sum of money is due to the decree holder and a direction therein that the same be paid in certain instalments and that, in default of payment of any instalment, the whole amount should be realised is not a direction for the payment of the money at a certain date. 199 P.R. 1890.
- (d) Compare 18 P.R. 1892 (F.B.), which decides that a decree for payments of the decree amount annually or monthly falls within s. 280, C.P. Code.
- (e) A decree directing payments to be made annually without specifying any particular date is not one directing payment to be made at a certain date within the meaning of this clause. 7 M. 63; 7 M. 80.
- (f) But, if it can be gathered from the decree itself that the payment is directed periodically or at periods as to which the decree is sufficiently indicative, such a decree will come within the clause. 14 M. 396.
- (g) If the decree be for an annuity or maintenance without specifying a precise date for payment but creating a periodically recurring right, the payments may be inferred as payable on the day year from the date of the decree. 12 B. 65; 3 B. 193.
- (h) Where the decree is for payment of maintenance annually on a specified date, an application for execution made more than three years from the date of the decree would not be barred for the amount payable for the three years next previous to the application, though no execution was taken out for more than three years in the interval. 18 M. 482.
- (i) Where a maintenance decree awards, and directs the payment of future, maintenance at a certain rate, such maintenance, when due, may be recovered in execution of that decree. 19 C. 189.
- (j) An agreement that the amount of a decree shall be payable in instalments, but not embodied in the decree, cannot be enforced in execution proceedings, except perhaps where the judgment-debtor has acquiesced in the agreement being treated as the decree. 190 P.R. 1882; 46 P.R. 1830; 200 P.R. 1889 and 20 P.R. 1994 (cited in Rivaaj on Limitation, p. 317).
- (k) In the case of a decree payable by instalments providing for execution of the entire decree-amount in case of any default, an application for execution will be within time under this article if it is made within three years from the date on which any instalment became due. 6 B.L. 31; 2 B.L.R.A.C. 245; 2 B.366; 2 A. 291; 13 C.L.R. 243; 16 A. 371.
- (l) In the case of a decree payable by instalments with a proviso to the effect that, in case of default in the payment of any one instalment, the whole amount should be payable at once, the decree-holder has the option to apply to execute his decree for any of the instalments that are not barred by limitation and not bound to apply for execution within three years of the first default. 100 P.R. 1902.

Cl. 6.—Payment 'which the decree directs to be made, &c.' (Continued.)

- (m) The proposition that, when no time is specified in an instalment decree, time begins to run from the date of the decree is not correct, if it is not impossible to ascertain the dates on which the instalments are payable. 22 P.R. 1905 = 57 P.L.R. 1905.
- (n) The holder of an instalment-decree, which provides for payment of the decree-amount in certain instalments and for the recovery of the whole amount, in case of any default, cannot, when he has once chosen to enforce the whole decree on a default being made, fall back on the provisions in the decree providing for payments in instalments. 2 A.L.J. 828 (Current Index, Limitation Act).
- (o) Where a decree payable by instalments contains no condition as to default, an application for execution of the decree for the whole amount within three years of the last application will not be barred, even though one or two applications had been put in for execution as if the whole amount had become due on default in the payment of some instalments. 48 P.R. 1900 (*Distinguishing* 19 M. 54.)
- (p) In the case of a decree for money payable by instalments with a proviso that, in the event of default, the decree should be executed for the whole amount, the decree would become barred in the absence of any application within three years from the date of the first default. 2 A. 448. Compare 4 A. 88; 4 A. 316; 7 A. 327; 7 C. 56; 18 C. 78; 20 C. 74.
- (q) In the case of an instalment-decree, providing for realisation of the entire amount in case of default and leaving it to the option of the decree-holder to enforce entire execution or not, time would run from the date of the first default, if any. 24 C. 281 = 1 C.W.N. 229; 6 C.W.N. 348.
- (r) Where a decree directs payment of the decree amount in certain instalments and that, in case of default, the whole amount should be realised, it is doubtful whether, in case of default, the decree-holder should apply within three years of the first default at the risk of being completely barred. *Per Mahmood, J.*—5 A. 201.
- (s) Where a decree directs the payment of the decree amount in instalments with a condition that the whole amount should be recoverable in case of default, waiver would be a good defence to the plea of limitation. 11 A. 482.
- (t) Where an instalment decree provides for entire execution on default, if the decree-holder has waived any such default, limitation will begin to run only from the next default (acceptance of a part payment, though not certified to the Court, constituting such waiver). 19 M. 168; 21 C. 542.

(4) Orders under s. 210, C.P. Code :—

- (a) An *ex parte* order under s. 210, C.P.C., giving time to the judgment-debtor to pay the decree-amount operates to extend the time though the decree itself is not altered in accordance with the order. The decree-holder may apply for execution within three years of the extended period. 7 M. 152.
- (b) If an order, on an application by the judgment-debtor reporting a certain adjustment between the parties, does not amount to one under s. 210, C.P.C., the application for execution after the passing of the order would not be governed by cl. 5 of this article. 61 P.R. 1886.

Cl. 6.-- Payment 'which the decree directs to be made, &c.' (Concluded).

- (c) Where, on an execution-application, the judgment-debtor applies for time for payment of the decree-amount and, on the consent of the decree-holder, the application for execution is struck off the file, this amounts to a decree under para 2 of s. 210, C.P.C., so as to entitle the decree-holder to apply for execution within three years from the time specified for payment. 11 C. 143.

But see 14 C. 348, which decides that where the Court simply orders time to be granted in accordance with the petition of the judgment-debtor without specifying the instalments for payments, the order is not one amounting to a decree under s. 210, C.P. Code.

(5) Miscellaneous cases :--

- (a) Where a Court frames a decree conditioned on the payment of a certain sum within a date fixed, it cannot extend such time after the expiry of the period mentioned in the decree. 13 A. 400.
- (b) Where the joint effect of the judgment and the decree that followed it is to allow a period of five years for the payment of the amount decreed, an application for execution within three years from the expiry of five years will be in time. 45 P.R. 1892.
- (c) In the case of a decree based on a compromise to the effect that plaintiff should be entitled to possession after the expiration of 15 years, held that an application put in after the expiration of 15 years was governed by this art. and was barred. 126 P.R. 1892 [following 43 P.R. 1878 (F.B.)]

Explanation I.**(1) Execution by one of several co-sharers :--**

Execution taken out by one of the co-sharers holding a decree for partition is sufficient to keep the decree alive in favour of all. 3 C. 551=2 C.L.R. 187; 9 C. 568.

(2) Decree specifying separate liability of judgment-debtor :--

- (a) Where a decree has been passed against two persons specifying the portions for which each is liable, execution against one of them only will not save limitation as against the other. 1 B. L. R. 258 (F.B.); 10 B.L.R. 359 (Note).
- (b) Where a decree has been passed against several persons in respect of several duties to be performed by each of them separately, an application to execute such a decree shall take effect only against such of the persons as it may be made against. 25 W.R. 310; 19 W.R. 30=10 B.L.R. 258.

(3) Execution against one of several joint judgment-debtors :--

- (a) Execution-proceedings against some only of the joint judgment-debtors under a decree will keep it alive as against all of them. 8 W.R. 80; 9 W.R. 240; 6 W.R. 18.
- (b) After the death of a judgment-debtor leaving several legal representatives, the decree-holder applied to execute his decree against one only of such representatives: held that such application will afford fresh limitation as against all the representatives. 3 A. 417=1 A.W.N. 16; 12 B. 48.

Explanation I.—(Concluded.)

(4) Execution against surety:—

Application for execution against a surety, for the payment of money under an order of Court, will be effectual towards keeping the order alive as against the principal debtor, only when the liability sought to be enforced is common to both under the order. 23 B. 478.

(5) Joint decree-holders:—

(a) Joint decree-holders, some of whom are minors—Right to apply for execution—Whether rights of minors are saved—*Vide* cases (a to c) under the heading "1—**a person**," at p. 572, *supra*.

(b) An application by one of the several holders of a joint decree will take effect and keep it in force in favour of all the holders. 8 W.R. 100; 11 W.R. 421; 21 W.R. 248; 22 W.R. 468; 13 W.R.³ 128; 6 W.R. Mis. 59; 6 W.R. Mis. 76; 1 W.R. Mis. 1; 11 W.R. 348; 8 M. 79.

(Note) In general, the law of limitation applicable to execution-proceedings is the one in force at the date of an application for execution. The present Limitation Act has been in force for nearly 30 years. It is extremely unlikely that the provisions of the old Limitation Acts will be called in aid in cases arising hereafter. So, in collecting the cases under the above article and under the several clauses of the same, I have omitted such of the cases as have been rendered unnecessary by the plain provisions of the present Act and have collected and inserted only such of the cases, under the Old Law, as are likely, throw light, directly or indirectly, on the construction of the article of limitation regarding Execution under the present Act. I crave the indulgence of the critic if, in any case, I have, in the exercise of my discretion, by any Act of commission or omission, gone wrong.

• A few cases under the Old Law which, I thought, would be useful, I have collected under the general heading '**Old Law**' (*vide infra*).

(Old Law)

- (1) Where, in spite of an arrangement, after decree, to pay the decree-amount into Court, by instalments, the decree-holder attempts to execute the original decree, payment into Court under the arrangement will not keep the original decree in force. 4 C. 877 = 8 C.L.R. 161; 4 B.L.R. 101 (F.B.); 13 W.R. 44 (F.B.); 5 N.W.P. 100.
- (2) The fact of a decree-holder's having had to meet an application by a third party, in relation to delivery of possession, cannot save limitation as regards an application for execution of the decree as to costs. 19 W.R. 226.
- (3) Procuring attachment of judgment-debtor's property and advertising the same for sale held to be proceedings to keep the decree in force under the Old Act of 1859. 12 W.R. 357.
- (4) An application to arrest the judgment-debtor held to be a proceeding to keep the decree in force under the Old Act of 1859. 17 W.R. 355.
- (5) The act of a Nazir in conducting a sale in execution and remitting the sale-proceeds to the Collector held to be proceedings to keep the decree in force. 15 W.R. 192.
- (6) An unsuccessful application to substitute the names of petitioners as representatives in the place of a deceased decree-holder was held not to be a proceeding to keep the decree in force under the Old Act of 1859. 6 W.R. Mis. 38.
- (7) Taking proceeds of a previous sale in execution held not to be a proceeding to keep the decree in force under the Act of 1859. 8 W.R. 274.

(Old Law)---(Concluded).

But see 6 A. 366.

- (8) Proceedings in execution as to means profits held to keep decree in force as to costs. 5 W.R. Mis. 40.
- (9) Proceedings in execution as to possession and costs held to keep decree in force as to means profits. 8 W.R. 99; 7 N.W.P.H.C. 95.
But, the application as to means profits must be made within three years from the date of the first application in execution. 8 C. 89=10 C.L.R. 272.
- (10) Proceedings to assess means profits held not to be proceedings to enforce the decree. 21 W.R. 212; 22 W.R. 328.
- (11) Where a decree-holder is referred to a regular suit and he conducts proceedings in consequence, such proceedings will keep the decree in force. 15 W.R. 207.
- (12) A suit by the decree-holder to set aside an adverse order on a claim petition put in by a third party was held to be a proceeding to keep the decree in force under Act XIV of 1859. 6 W.R. Mis. 14; 2 W.R. Mis. 3; B.L.R. Sup. Vol. 709=7 W.R. 515; 8 W.R. 88; 3 C. 716=2 C.L.R. 220;
(13) even if such a suit were to be eventually unsuccessful. 8 W.R. 99; 98; 6 W.R. Mis. 48.
- (14) But compare 17 C. 268, and cases under the heading "Continuation of Proceedings," *supra*.
- (15) Intermediate proceedings between the real decree-holder and a person pretending to be entitled to execute the decree will, when the real decree-holder ultimately succeeds in establishing his superior right over the pretender, have the effect of keeping the decree in force. 4 B.L.R.A.C. 1=12 W.R. 436.
- (16) A dispute between purchaser of decree and a third party, cannot have the effect of keeping the decree in force. 10 W.R. 240; 14 W.R. 391; 17 W.R. 99.
- (17) Striking case off the file cannot have the effect of keeping the decree in force. 8 W.R. 320; so, also, where an execution-case is struck off the file for want of prosecution. B.L.R. Sup. Vol. 492=6 W.R. Mis. 98.
- (18) No question of *bona fides* of previous applications or questions of diligence and industry arise under this clause as under the Old Act. 11 A.W.N. 48; 10 A.W.N. 77.
- (19) An application for execution, if in due form, is one to keep the decree in force. It is not necessary for the decree-holder to take further proceedings. 2 N.W.P.H.C. 186.
- (20) A decree for maintenance payable by instalments must be executed within three years from the date when the first instalment falls due. 4 M.H.C. 275.
- (21) A *bona fide* application to execute an aliquot part of a decree, though irregular and illegal, is sufficient to keep the decree alive. 15 W.R. 449; 16 W.R. 29; 16 W.R. 267; 25 W.R. 70.
- (22) Where a judgment-debtor is found to have no property available for execution, the decree-holder can always file applications simply to keep in force his decree. 25 W.R. 546; 3 C. 235.
- (23) Applications for review cannot be treated as effectual towards keeping the decree alive. 19 W.R. 185.
- (24) S. 20 of Act XIV of 1859 (=art. 179 of the present Act) was not applicable to a decree until the liability under it has become enforceable by process of execution. 4 M.H.C. 173.

180.—To enforce a judgment, *Twelve years.* When a present right to decree, or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, of an order of Her Majesty in Council.

enforce the judgment, decree, or order accrues to some person capable of releasing the right: Provided that, when the judgment, decree, or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor⁽¹⁾, payment, or acknowledgment, or the latest of such revivors, payments, or acknowledgments as the case may be.

(Notes)

Scope of article.

(1) Applicability of s. 230, C. P. Code :—

This article is intended to be independent of the Civil Procedure Code, s. 230, which section cannot, therefore, be applied either to a decree or order of a High Court on its original side or to an order of His Majesty in Council. 20 C. 551; 6 B. 258; 7 M. 450.

(2) Decree of the Privy Council :—

(a) An application to execute an order of His Majesty in Council falls under this article even when it has merely confirmed the decree of the Court below. 8 C. 218; 10 C.L.R. 425; 22 W.R. 102.

(b) Execution of an order of the Privy Council must be applied for in the Court from which the appeal was preferred to His Majesty, 22 W.R. 102; and

Scope of article. —(Concluded.)

such Court is bound to direct its execution by the Court of first instance. 18 W.R. 175.

(3) Decree of High Court in its appellate jurisdiction :—

A decree by the High Court in its appellate jurisdiction does not fall under this article and is therefore governed by the three years' limitation under art. 179. 16 W.R. 318.

(4) Decree of High Courts (Insolvency jurisdiction):—

(a) A judgment of the High Court, as a Court for the relief of insolvent debtors, is entered up in the ordinary course of duty cast upon the High Court by the law, not by way of special or extraordinary action but in the exercise of its ordinary original civil jurisdiction. The starting point and the period assigned by this article will therefore govern such a judgment. 18 B. 520.

(b) A judgment entered up under s. 86 of the Indian Insolvent Act (Statutes 11 and 12, Vic. Ch. XXI) could not be regarded as passed in the High Court's exercise of its ordinary original civil jurisdiction and to an application to enforce such judgment, this art. does not apply. 11 B. 138 (*Per Sargent, C. J.*)

Held, contra, that such a judgment ranked as a judgment of a Chartered Court in the exercise of its ordinary original civil jurisdiction and was therefore governed by this article. (*Per West, J.*) 11 B. 138.

(5) Execution by High Court of decrees of other Court :—

Art. 179 and not this article applies to cases of execution by High Court of Small Cause Court decrees transferred to it for execution. The limitation applicable depends on the status of the Court, which passed the decree and not on that of the Court executing it. 17 C. 491.

(6) Applicability of s. 19 of the Act :—

In 11 B. 508, at p. 513, the question was left open whether this article was or was not controlled by the provisions of s. 19 of the Act, in other words, whether the acknowledgment under the section need not have been made within the prescribed period of 12 years.

I.—'Revivor.'

Any order, towards execution, made by the High Court, after issue of a notice to the judgment-debtor, under s. 248 of the C. P. Code, will operate as a revivor of the decree and give a fresh start for limitation. 6 C. 504; 20 C. 551; 26 A. 361=A.W.N. (1904), p. 51=1 A.L.J. 30; 24 C. 244.

(Old Law).

(1) Where, on an appeal to it, the High Court merely confirmed the decree of the lower Court, the limitation of 12 years did not apply except as to that part of the order which related to costs. 11 W.R. 206.

(2) There was no provision of law limiting the period within which orders of the Privy Council were sought to be executed. 6 W.R. 69.

(3) The Court of first instance, to which an order of the Privy Council may be transmitted by the High Court for execution, was bound to execute it as if it was an express decree of the High Court. 20 W.R. 419.

